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TRANSCRIPT OF RECORD

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CHARLES ELMORE CROPLEY
CLERK

IN THE

74938
Sup. Ct.

Supreme Court of the United States

October Term, 1946

No. 836

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Petitioner,

vs.

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Respondents.

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Rotary Colorprint, 870 Brannan Street, San Francisco

No. 11255

United States

Circuit Court of Appeals

For the Ninth Circuit.

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Appellants,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Amendment to First Amended Complaint..... 23

Amended Complaint, First 9

Answer to First Amended Complaint, as Amended 25

Appeal:

- Certificate of Clerk to Transcript of Record on 194
- Further Order Dispensing with Reproduction of Exhibits on 198
- Notice of 63
- Orders Extending Time to Docket Record on 68, 69
- Statement of Points on Which Appellants Intend to Rely on 196
- Stipulation and Order for Transmittal of Original Exhibits on 67
- Stipulation Designating Portions of Record to be Contained in Record on..... 64
- Stipulation for Withdrawal of Original Exhibits on 66
- Suppplemental Designation of Portions of Record to be Omitted from Printed Transcript on 199

INDEX PAGE

Certificate of Clerk to Transcript of Record on Appeal 194

Complaint 2

Complaint, First Amended 9

Findings of Fact and Conclusions of Law.... 69

First Amended Complaint 9

Judgment 59

Memorandum and Order, dated Oct. 11, 1943.. 7

Memorandum and Order for Judgment, dated May 28, 1945 44

Memorandum of Costs and Disbursements.... 61

Names and Addresses of Attorneys..... 1

Notice of Appeal 63

Order Dispensing with Reproduction of Exhibits 198

Orders Extending Time to Docket..... 68, 69

Order of Removal 5

Order re Proposed Amendments to Findings of Fact and Conclusions of Law..... 58

Proposed Amendments to Findings of Fact and Conclusions of Law 51

Statement of Points on Which Appellants Intend to Rely on Appeal 196

Stipulation and Order for Transmittal of Certain Original Exhibits 67

INDEX

PAGE

Stipulation Designating Portions of Record to be Contained in Record on Appeal (DC).... 64

Stipulation for Withdrawal of Original Exhibits 66

Supplemental Designation of Portions of Record to be Omitted from Printed Transcript 199

Transcript of Testimony and Proceedings.... 80

Exhibits for Defendants:

C—Notice to Employees dated Oct. 24, 1938, and Attached Scale of Wages.. 143

D—Notice to Employees dated Nov. 1, 1938, and Attached Scale of Wages.. 145

I—Letter dated Dec. 13, 1940, to P. R. Bradley, President, signed Wesley O. Ash by Dorothy M. Williams..... 163

J—Letter dated July 12, 1940, Baird Snyder to Mr. Robert S. Palmer..... 189

Witnesses for Defendants:

Faulkner, H. L.

—direct 112

—cross 132

—redirect 135

Williams, Joseph A.

—direct 136

—cross 155

—redirect 161, 176

—recross 173, 179

INDEX PAGE

Witnesses for Plaintiffs:

Edises, Bertram

—direct 182

Robertson, E. E.

—direct 94

—cross 95

—redirect 111

—recross 111

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Attorneys for Defendants and Appellees.

In the Superior Court of the State of California in and for the City and County of San Francisco

No. 318105

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor, and all other persons similarly situated,

Plaintiffs,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a corporation, WHITE COMPANY, a corporation, and BLACK COMPANY, a corporation,

Defendants.

COMPLAINT UNDER THE FAIR LABOR STANDARDS ACT

Plaintiffs complain of defendants and for cause of action allege:

I.

This action is brought under the provisions of the Act of June 25, 1938, Chapter 676, 52 Stat. 1069, 29 U. S. C. §§201-219, known as the Fair Labor Standards Act.

II.

Jurisdiction is conferred on this Court by § 16-B

of the [1*] Fair Labor Standards Act, and by 28 U. S. C. §41, paragraph 8.

III.

E. E. Robertson brings this action as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor, and also brings this action on behalf of all other persons similarly situated.

IV.

Defendant Alaska Juneau Gold Mining Company is a foreign corporation whose principal place of business is San Francisco, California.

V.

Plaintiffs are ignorant of the true names of defendants sued herein as White Company and Black Company, and for that reason have sued said defendants under said names which are fictitious. Plaintiffs pray that when the true names of said defendants are ascertained, said true names may be inserted herein and in all the records and proceedings in lieu of said fictitious names, and that this action may thenceforth proceed against said defendants under their true names.

VI.

Defendants at all times hereinafter mentioned were engaged in mining and the preparation of

* Page numbering appearing at foot of page of original certified Transcript of Record.

various metals in the vicinity of Juneau, Alaska. A substantial portion of the metals produced or handled by defendants during said period were produced for or transported in interstate commerce. A substantial portion of said metals were in competition with products which were produced for and transported in interstate commerce. A substantial amount of products or materials produced for and delivered in interstate commerce were required and consumed by defendants in the said production and handling by defendants of their own products.

VII.

Plaintiffs were employed by defendants during the period from October 28, 1938, to the date of the filing of this complaint. The functions performed by said plaintiffs were an essential part of and necessary to the mining, preparation and transportation of said metals in and for interstate commerce.

VIII.

Defendants worked plaintiffs during the period from October 28, 1938, to October 27, 1939, in excess of 44 hours in many work weeks; and during the period from October 28, 1939, to October 27, 1940, in excess of 42 hours in many work weeks; and after October 28, 1940, in excess of 40 hours during many work weeks, without paying them the overtime pay required by § 7 of the Fair Labor Standards Act. Therefore a sum of money is due plaintiffs by defendants, but plaintiffs are unable to determine the exact amount because all records,

books and accounts were, and under the Act are required to be, maintained by defendants.

Wherefore, plaintiffs pray:

1. Defendants be required to account to plaintiffs and show in said accounting the number of hours during which plaintiffs worked in each work week, commencing with the 28th day of October, 1938, the hourly wage for the hours worked during said period, and the overtime pay, if any, paid to plaintiffs during said period.

2. Judgment be rendered in favor of plaintiffs for all sums which may be found to be due plaintiffs as aforesaid, and for an additional equal amount as liquidated damages, and for attorneys' fees and costs, and for such other and further relief as to the Court may seem proper.

GLADSTEIN, GROSSMAN,
MARGOLIS AND SAWYER
Attorneys for Plaintiffs.

(Duly Verified.)

[Endorsed]: Filed April 23, 1943.

[Title of Superior Court and Cause.]

ORDER OF REMOVAL

The defendant, Alaska Juneau Gold Mining Company, having within the time provided by law, filed its petition praying for the removal of this cause to the United States District Court for the

Northern District of California, Southern Division, and having at the same time filed its bond in the sum of One Thousand Dollars ($1,000.00) with good and sufficient surety and conditioned according to law, it is, on motion of Wm. E. Colby and Geo. W. Wilson, attorneys for petitioner and above named defendant,

Ordered, that said petition be, and it hereby is, accepted, [10] and said bond is approved; and it is further

Ordered, that the above entitled cause be removed to the United States District Court for the Northern District of California, Southern Division, and that all further proceedings in this Court be stayed.

May 6th, 1943.

ALFRED J. FRITZ

Presiding Judge

[Endorsed]: Filed May 6, 1943. H. A. van der Zee, Clerk.

[Endorsed]: Filed June 4, 1943. Walter B. Maling, Clerk. [11]

In the Southern Division of the United States District Court for the Northern District of California.

No. 22658-S

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor, Stanley A. Ereberg, Ivan Di Boff, Paul Cvorovich, Frank Maver, Virgil J. Newell, W. S. Skjaich, Roy H. Banta, Mark J. Storms, and all other persons similarly situated,

Plaintiffs.

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a corporation, WHITE COMPANY, a corporation, and BLACK COMPANY, a corporation,

Defendants.

MEMORANDUM AND ORDER

Defendant Alaska Juneau Gold Mining Company moves to dismiss plaintiff's complaint and further moves for a more definite statement of certain matters alleged in the complaint.

Said defendant objects to the assertion by plaintiffs of the right to recover unpaid overtime compensation in excess of three years next preceding the commencement of the action of April 23, 1943,

on the ground that the balance of the claim is barred under the provisions of Section 338 (1) of the Code of Civil Procedure of the State of California. The objection is sustained.

A further objection is made to the allegation in the complaint that "a sum of money is due plaintiffs by defendants, but plaintiffs are unable to determine the exact amount because all records, books and accounts were, and under the Act are required to be, maintained by defendants." [18] Plaintiffs pray that defendants be therefore required to account to plaintiffs for the number of hours plaintiffs worked, commencing with October 28, 1938, the hourly wage, and the overtime payments to plaintiffs during said period. Defendants are under no duty to account to plaintiffs. This objection is also sustained. Plaintiffs, if so advised, may obtain the required information by discovery.

The remainder of defendant's objections to the complaint do not appear to be well taken.

It is therefore

Ordered:

Defendant's motion to dismiss and motion to make more certain are granted as above indicated.

Plaintiffs are allowed twenty days to amend their complaint.

Dated: October 11, 1943.

A. F. ST. SURE
United States District Judge

[Endorsed]: Filed Oct. 11, 1943. [19]

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT UNDER THE FAIR LABOR STANDARDS ACT

Plaintiffs complain of defendants and for cause of action allege:

I.

This action is brought under the provisions of the Act of June 25, 1938, Chapter 676, 52 Stat. 1069, 29 U. S. C. Sections 201-219, known as the Fair Labor Standards Act. [20]

II.

Jurisdiction is conferred on this Court by Section 16-B of the Fair Labor Standards Act, and by 28 U. S. C. Section 41, paragraph 8.

III.

E. E. Robertson brings this action as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor, Stanley A. Ereberg, Ivan Di Boff, Paul Cvorovich, Frank Maver, Virgil J. Nowell, W. S. Kljaich, Roy H. Banta, Mark J. Storms, and also brings this action on behalf of all other persons similarly situated.

IV.

Defendant Alaska Juneau Gold Mining Company is a foreign corporation whose principal place of business is San Francisco, California.

V.

Plaintiffs are ignorant of the true names of defendants sued herein as White Company and Black Company, and for that reason have sued said defendants under said names which are fictitious. Plaintiffs pray that when the true names of said defendants are ascertained, said true names may be inserted herein and in all the records and proceedings in lieu of said fictitious names, and that this action may thenceforth proceed against said defendants under their true names.

VI.

Defendants at all times hereinafter mentioned were engaged in mining and the preparation of various metals in the vicinity of Juneau, Alaska. A substantial portion of the metals produced or handled by defendants during said period were produced for or transported in interstate commerce. A substantial portion of said metals were in competition with products which were produced for and transported in interstate commerce. A substantial amount of [21] products or materials produced for and delivered in interstate commerce were required and consumed by defendants in the said production and handling by defendants of their own products.

VII.

Plaintiffs were employed by defendants for a period of three years next immediately preceding the filing of the complaint. The functions performed by said plaintiffs were an essential part of

and necessary to the mining, preparation and transportation of said metals in and for interstate commerce.

VIII.

Plaintiffs incorporate herein with like effect, as though fully set forth at length, Schedules 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, attached hereto and made a part hereof.

Defendants worked plaintiff E. E. Robertson from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 1, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff E. E. Robertson the sum of two hundred and fifty-nine dollars and four cents ($259.04) for compensation for overtime employment, and the further sum of two hundred and fifty-nine dollars and four cents ($259.04) as a penalty for failure to pay said overtime compensation, being a total sum of five hundred and eighteen dollars and eight cents ($518.08).

Defendants worked plaintiff J. A. Behrends from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 2, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff J. A. Behrends the sum of one hundred and twenty-five dollars and forty-six cents ($125.46) for compensation for overtime employment, and the further [22] sum of one hundred and twenty-

five dollars and forty-six cents ($125.46) as a penalty for failure to pay said overtime compensation, being a total sum of two hundred and fifty dollars and ninety-two cents ($250.92).

Defendants worked plaintiff Marko Dapcewich from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 3, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Marko Dapcevich the sum of one hundred and forty-nine dollars and sixty-four cents ($149.64) for compensation for overtime employment, and the further sum of one hundred and forty-nine dollars and sixty-four cents ($149.64) as a penalty for failure to pay said overtime compensation, being a total sum of two hundred and ninety-nine dollars and twenty-eight cents ($299.28).

Defendants worked plaintiff Sam Dapcevich from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 4, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Sam Dapcevich the sum of one hundred and ten dollars and seventy-seven cents ($110.77) for compensation for overtime employment, and the further sum of one hundred and ten dollars and seventy-seven cents ($110.77) as a penalty for failure to pay said overtime compensation, being a total sum of two hundred and twenty-one dollars and fifty-four cents ($221.54).

Defendants worked plaintiff Raymond C. Haydon from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 5, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Raymond C. Haydon the sum of two hundred and two dollars and thirty-eight cents ($202.38) [23] for compensation for overtime employment, and the further sum of two hundred and two dollars and thirty-eight cents ($202.38) as a penalty for failure to pay said overtime compensation, being a total sum of four hundred and four dollars and seventy-six cents ($404.76).

Defendants worked plaintiff Boyd E. Marshall from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 6, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Boyd E. Marshall the sum of ninety-two dollars and thirty-two cents ($92.32) for compensation for overtime employment, and the further sum of ninety-two dollars and thirty-two cents ($92.32) as a penalty for failure to pay said overtime compensation, being a total sum of one hundred and eighty-four dollars and sixty-four cents ($184.64).

Defendants worked plaintiff Richard W. Marshall from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 7, without paying him the overtime compensation required by

Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Richard W. Marshall the sum of one hundred and twenty-five dollars and twenty-eight cents ($125.28) for compensation for overtime employment, and the further sum of one hundred and twenty-five dollars and twenty-eight cents ($125.28) as a penalty for failure to pay said overtime compensation, being a total sum of two hundred and fifty dollars and fifty-six cents ($250.56).

Defendants worked plaintiff Ernest McGilligan from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 8, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Ernest McGilligan [24] the sum of two hundred and twelve dollars and thirty-eight cents ($212.38) for compensation for overtime employment, and the further sum of two hundred and twelve dollars and thirty-eight cents ($212.38) as a penalty for failure to pay said overtime compensation, being a total sum of four hundred and twenty-four dollars and seventy-six cents ($424.76).

Defendants worked plaintiff Lynn E. Pope from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 9, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Lynn E. Pope the sum of thirty-five dollars and fifty cents ($35.50) for compensation for overtime

employment, and the further sum of thirty-five dollars and fifty cents ($35.50) as a penalty for failure to pay said overtime compensation, being a total sum of seventy-one dollars ($71.00).

Defendants worked plaintiff Emil Rundage from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 10, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Emil Rundage the sum of one hundred and three dollars and eighty cents ($103.80) for compensation for overtime employment, and the further sum of one hundred and three dollars and eighty cents ($103.80) as a penalty for failure to pay said overtime compensation, being a total sum of two hundred and seven dollars and sixty cents ($207.60).

Defendants worked plaintiff Hal Windsor from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 11, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Hal Windsor the sum of two hundred and fifty dollars and fifty-two cents ($250.52) for compensation for overtime employment, and the further sum of [25] two hundred and fifty dollars and fifty-two cents ($250.52) as a penalty for failure to pay said overtime compensation, being a total sum of five hundred and one dollars and four cents ($501.04).

Defendants worked plaintiff Stanley A. Ereberg from April 23, 1940, to April 30, 1941, as more

particularly set forth in said Schedule 12, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Stanley A. Ereberg the sum of sixty-four dollars and fifteen cents ($64.15) for compensation for overtime employment, and the further sum of sixty-four dollars and fifteen cents (64.15) as a penalty for failure to pay said overtime compensation, being a total sum of one hundred and twenty-eight dollars and thirty cents ($128.30).

Defendants worked plaintiff Ivan Di Boff from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 13, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Ivan Di Boff the sum of seventy-eight dollars and fifty-four cents ($78.54) for compensation for overtime employment, and the further sum of seventy-eight dollars and fifty-four cents ($78.54) as a penalty for failure to pay said overtime compensation, being a total sum of one hundred and fifty-seven dollars and eight cents ($157.08).

Defendants worked plaintiff Paul Cvorovich from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 14, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Paul Cvorovich the sum of ninety-five dollars and forty cents ($95.40) for compensation for overtime

employment, and the further sum of ninety-five dollars and forty cents ($95.40) as a penalty for failure to pay said overtime compensation, being a total sum of one hundred and ninety [26] dollars and eighty cents ($190.80).

Defendants worked plaintiff Frank Maver from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 15, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Frank Maver the sum of one hundred and eighty-two dollars and twenty two cents ($182.22) for compensation for overtime employment, and the further sum of one hundred and eighty-two dollars and twenty-two cents ($182.22) as a penalty for failure to pay said overtime compensation, being a total sum of three hundred and sixty-four dollars and forty-four cents ($364.44).

Defendants worked plaintiff Virgil J. Newell from April 23, 1940, to April 30, 1941, as more particularly set forth in said Schedule 16, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff Virgil J. Newell the sum of two hundred and one dollars and twenty-two cents ($201.22) for compensation for overtime employment, and the further sum of two hundred and one dollars and twenty-two cents ($201.22) as a penalty for failure to pay said overtime compensation, being a total sum of four hundred and two dollars and forty-four cents ($402.44).

Defendants worked plaintiff W. S. Kljaich from April 23, 1940, to April 30, 1941, as more particuly set forth in said Schedule 17, without paying him the overtime compensation required by Section 7 of the Fair Labor Standards Act; therefore, there is now due and payable from defendants to plaintiff W. S. Kljaich the sum of seventy-five dollars and fifty-five cents ($75.55) for compensation for overtime employment, and the further sum of seventy-five dollars and fifty-five cents ($75.55) as a penalty for failure to pay said overtime compensation, being a total sum [27] of one hundred and fifty-one dollars and ten cents ($151.10).

Wherefore, plaintiffs pray judgment against defendants, and each of them, as follows:

1. For the sum of two thousand and three hundred and sixty-four dollars and seventeen cents ($2,364.17) for overtime compensation due and payable to plaintiffs.

2. For the sum of two thousand and three hundred and sixty-four dollars and seventeen cents ($2,364.17) as punitive damages.

3. For reasonable attorney's fees and costs of suit herein.

4. For such other and further relief as to this Court may seem meet and proper in the premises.

GLADSTEIN, GROSSMAN,
SAWYER & EDISES
By ETHEL LIVINGSTON
Attorneys for Plaintiffs [28]

SCHEDULE No. 1

RECORD OF E. E. ROBERTSON

I.—Period covered by the Fair Labor Standards Act, Sec. 7(a) Sub. (2), requiring overtime compensation for a workweek longer than forty-two hours.

Workweek	Hours Worked in Excess of Forty-two	Hourly Overtime Rate	Overtime Compensation Due and Payable	Overtime Compensation Paid	Bal. O.C. Due and Payable	Penalty Due and Payable	Total Due and Payable
1940							
April 22-27	6	$1.03½	$ 6.21	$ 3.63	$ 2.58	$ 2.58	$ 5.16
Apr. 28-May 4	14	1.05	14.70	9.43	5.27	5.27	10.54
May 5-11	14	1.03½	14.49	10.66	4.83	4.83	9.66
May 12-18	14	1.05	14.70	9.49	5.21	5.21	10.42
May 19-25	14	1.05	14.70	9.73	4.97	4.97	9.94
May 26-June 1	14	1.05	14.70	9.73	4.97	4.97	9.94
June 2-8	14	1.05	14.70	9.73	4.97	4.97	9.94
June 9-15	14	1.05	14.70	9.73	4.97	4.97	9.94
June 16-22	14	1.05	14.70	9.73	4.97	4.97	9.94
June 23-29	14	1.05	14.70	9.73	4.97	4.97	9.94
July 7-13	14	1.05	14.70	9.73	4.97	4.97	9.94
July 21-27	14	1.05	14.70	9.73	4.97	4.97	9.94
July 28-Aug. 3	14	1.05	14.70	9.73	4.97	4.97	9.94
Aug. 4-10	14	1.05	14.70	9.73	4.97	4.97	9.94

Schedule No. 1—(Continued)

RECORD OF E. E. ROBERTSON

I.—Period covered by the Fair Labor Standards Act, Sec. 7(a) Sub. (2), requiring overtime compensation for a workweek longer than forty-two hours.—(Continued)

Workweek	Hours Worked in Excess of Forty-two	Hourly Overtime Rate	Overtime Compensation Due and Payable	Overtime Compensation Paid	Bal. O.C. Due and Payable	Penalty Due and Payable	Total Due and Payable
1940							
Aug. 11-17	14	$1.05	$14.70	$ 9.73	$ 4.97	$ 4.97	$ 9.94
Aug. 18-24	14	1.05	14.70	9.73	4.97	4.97	9.94
Aug. 25-31	14	1.05	14.70	9.73	4.97	4.97	9.94
Sep. 8-14	14	1.05	14.70	9.73	4.97	4.97	9.94
Sep. 15-21	14	1.05	14.70	9.73	4.97	4.97	9.94
Sep. 22-28	14	1.05	14.70	9.73	4.97	4.97	9.94
Sep. 29-Oct. 5	14	1.05	14.70	9.73	4.97	4.97	9.94
Oct. 6-12	14	1.05	14.70	9.73	4.97	4.97	9.94
Oct. 13-19	14	1.05	14.70	9.73	4.97	4.97	9.94
Oct. 20-26	14	1.05	14.70	9.73	4.97	4.97	9.94
Total					$117.29	$117.29	$234.58

Schedule No. 1—(Continued)

II.—Period covered by the Fair Labor Standards Act, Sec. 7(a) Sub. (3), requiring overtime compensation for a workweek longer than forty hours.

Workweek	Hours Worked in Excess of Forty	Hourly Overtime Rate	Overtime Compensation Due and Payable	Overtime Compensation Paid	Bal. O.C. Due and Payable	Penalty Due and Payable	Total Due and Payable
Balance brought forward.....					$117.29	$117.29	$234.58
1940							
Oct. 26-Nov. 2	16	$1.05	$16.80	$11.13	5.67	5.67	11.34
Nov. 3-9	16	1.05	16.80	11.13	5.67	5.67	11.34
Nov. 10-16	16	1.05	16.80	11.13	5.67	5.67	11.34
Nov. 17-23	16	1.05	16.80	11.13	5.67	5.67	11.34
Nov. 24-30	16	1.05	16.80	11.13	5.67	5.67	11.34
Dec. 1-7	16	1.05	16.80	11.13	5.67	5.67	11.34
Dec. 8-14	16	1.05	16.80	11.13	5.67	5.67	11.34
Dec. 15-21	16	1.05	16.80	11.13	5.67	5.67	11.34
Dec. 28-Jan. 4	16	1.05	16.80	11.13	5.67	5.67	11.34
1941							
Jan. 5-11	16	1.05	16.80	11.13	5.67	5.67	11.34
Jan. 12-18	16	1.05	16.80	11.13	5.67	5.67	11.34
Jan. 19-25	16	1.05	16.80	11.13	5.67	5.67	11.34
Jan. 26-Feb. 1	16	1.05	16.80	11.13	5.67	5.67	11.34

Schedule No. 1—(Continued)

RECORD OF E. E. ROBERTSON

II.—Period covered by the Fair Labor Standards Act, Sec. 7(a) Sub. (3), requiring overtime compensation for a workweek longer than forty-hours.—(Continued)

Workweek	Hours Worked in Excess of Forty	Hourly Overtime Rate	Overtime Compensation Due and Payable	Overtime Compensation Paid	Bal. O.C. Due and Payable	Penalty Due and Payable	Total Due and Payable
1941							
Feb. 2-8	16	$1.05	$16.80	$11.13	5.67	5.67	11.34
Feb. 9-15	16	1.05	16.80	11.13	5.67	5.67	11.34
Feb. 16-22	16	1.05	16.80	11.13	5.67	5.67	11.34
Feb. 23-Mar. 1	16	1.05	16.80	11.13	5.67	5.67	11.34
Mar. 2-8	16	1.05	16.80	11.13	5.67	5.67	11.34
Mar. 9-15	16	1.05	16.80	11.13	5.67	5.67	11.34
Mar. 16-22	16	1.05	16.80	11.13	5.67	5.67	11.34
Mar. 23-29	16	1.05	16.80	11.13	5.67	5.67	11.34
Mar. 30-Apr. 5	16	1.05	16.80	11.13	5.67	5.67	11.34
Apr. 6-12	16	1.05	16.80	11.13	5.67	5.67	11.34
Apr. 13-19	16	1.05	16.80	11.13	5.67	5.67	11.34
Apr. 20-26	16	1.05	16.80	11.13	5.67	5.67	11.34
				Total	$259.04	$259.04	$518.08

(Duly Verified.)

[Endorsed]: Filed May 4, 1944.

[Title of District Court and Cause.]

AMENDMENT TO FIRST AMENDED COMPLAINT UNDER THE FAIR LABOR STANDARDS ACT

Come now plaintiffs and amend the first amended complaint on file herein in the following respects only:

I.

By striking out the words: "as a penalty for failure to pay said overtime compensation" and substituting therefor the words: "in an additional equal amount as liquidated damages" wherever said words appear in the first amended complaint, to-wit:

Page 3, Paragraph VIII, lines 22 and 23.

Page 4, Paragraph VIII, lines 2 and 3.

Page 4, Paragraph VIII, lines 13 and 14.

Page 4, Paragraph VIII, lines 23 and 24.

Page 5, Paragraph VIII, lines 2 and 3.

Page 5, Paragraph VIII, lines 13 and 14.

Page 5, Paragraph VIII, lines 25 and 26.

Page 6, Paragraph VIII, line 4. [63]

Page 6, Paragraph VIII, lines 14 and 15.

Page 6, Paragraph VIII, lines 23 and 24.

Page 7, Paragraph VIII, lines 1 and 2.

Page 7, Paragraph VIII, lines 11 and 12.

Page 7, Paragraph VIII, lines 21 and 22.

Page 7, Paragraph VIII, lines 31 and 32.

Page 8, Paragraph VIII, lines 10 and 11.

Page 8, Paragraph VIII, line 21.

Page 8, Paragraph VIII, lines 31 and 32.

II.

By striking out the words: "punitive damages" on lines 9 and 10 of Paragraph 2 on page 9 in the Prayer of said first amended complaint and substituting therefor the words: "liquidated damages."

III.

By striking out the word: "Penalty" wherever said word appears in the schedules appended to said first amended complaint, and substituting therefor the words: "Liquidated Damages."

And plaintiffs further pray that said first amended complaint may be amended on its face to conform to the above stated amendments.

GLADSTEIN, GROSSMAN,
SAWYER & EDISES

By ETHEL LIVINGSTON
Attorneys for Plaintiffs.

(Affidavit of Service by Mail.)

[Endorsed]: Filed July 14, 1944. [64]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, ALASKA JUNEAU GOLD MINING COMPANY, TO FIRST AMENDED COMPLAINT AS AMENDED.

Defendant, Alaska Juneau Gold Mining Company, answering the first amended complaint on file herein, as amended by the instrument on file herein entitled "Amendment to First Amended Complaint Under the Fair Labor Standards Act," all subsequent references herein to said first amended complaint to be construed as a reference to it as so amended, admits, alleges and denies as follows:

I.

Answering Paragraph III of said first amended complaint, this defendant is informed and believes that E. E. Robertson is not the representative of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Hayden, Boyd E. Marshall, Richard W. Marshall, Ernest [65] McGilligan, Lynn E. Pope, Emil Rundage, Hal Windsor, Stanley A. Eneberg, Ivan DiBoff, Paul Cvorovich, Frank Maver, Virgil J. Newell, W. S. Kljaich, Roy H. Banta, Mark J. Storms, or any of them, and alleges that as to some, at least, of said plaintiffs, defendant is informed and believes that he had no authority to bring this action on their behalf, and basing its denial and allegation on such information and belief, denies that said Robertson is a representative of said last named parties, or any of

them, or any other persons similarly situated, and alleges that said Robertson had no authority to bring said action on behalf of said parties, or any of them, or any other persons similarly situated.

II.

Answering Paragraph V of said first amended complaint, this defendant alleges that White Company and Black Company named therein are fictitious parties and said defendants have no actual existence in fact, and that there are no actual parties having any interest in this action as defendants who should be substituted for said fictitious parties, or either of them.

III.

Answering Paragraph VI of said first amended complaint this defendant admits that at all times mentioned thereafter in said complaint it was engaged in mining gold ores, and in the treatment and reduction of gold ores, and in the extraction of gold therefrom, and that while there are comparatively small quantities of other metals recovered as a result of said operations these are relatively small in amount and value as compared with the gold and gold values recovered. Further answering said first amended complaint this defendant denies that said gold products are produced for or transported in interstate commerce in competition with products which are produced for, or transported in, interstate commerce, or at all, and this defendant further denies that it is engaged in interstate commerce or carries on [66] any activities within the

meaning or intent or operation of the Fair Labor Standards Act.

IV.

Answering Paragraph VII of said first amended complaint this defendant admits that plaintiffs, during their respective periods of employment, were performing functions which were an essential part of, or were necessary to the mining or preparation or transportation of said gold and the comparatively small amounts of other metals, but denies that such functions or activities, or any of them, were in or for interstate commerce or within the meaning or intent or operation of the Fair Labor Standards Act.

V.

Answering Paragraph VIII of said first amended complaint this defendant denies that there is any sum or sums of money due plaintiffs, or any of them, under any of the provisions of the Fair Labor Standards Act by reason of any alleged overtime work by any of them, or otherwise, or at all. On the contrary, this defendant alleges that each of said plaintiffs has been paid and settled with for all work, overtime, or otherwise, performed by each during any and all of the periods of time, or any portions thereof, specified in Paragraph VIII of said first amended complaint, and defendant further alleges that there are no sums, or any sum of money due said plaintiffs, or any of them, by defendant for any work, overtime, or otherwise, performed by any of said defendants during any period of time prior to the filing of this action.

As its first, further and separate answer to said first amended complaint defendant alleges:

I.

That defendant, Alaska Juneau Gold Mining Company, during the period of time April 23, 1940, to April 30, 1941, mentioned in said complaint and for many years prior thereto and until recently has [67] been operating a gold mine and mining gold bearing ores in the vicinity of Juneau, Alaska. That this is the mine in which or in connection with which plaintiffs were employed by this defendant during the times alleged in said first amended complaint. That these gold ores are of extremely low grade, averaging in value less than one dollar per ton of recoverable gold. In order to operate economically and make any profit at all several thousand tons of ore per day must be mined and treated and all costs, including wages for labor, kept at a reasonable minimum, otherwise the narrow margin of profit will turn into a loss and deficit. That gold is the predominant value in said ores and other minerals recovered therefrom are very subordinate in importance and value as compared with the gold values recovered.

II.

That on October 24, 1938, when the Fair Labor Standards Act went into effect defendant was employing and paying its employees on a weekly basis for regular time and overtime. That prior to said date defendant had discussed with its employees the provisions of the act and they had mu-

tually agreed to an adjustment of wages so that the adjusted wages would approximately equal the wages previously paid and notice to this effect was posted on said mine premises on its bulletin board in a conspicuous place where all of its employees could easily see and read the same. Attached to said notice was said revised wage scale which was to become and did become effective on and after October 24, 1938, and which new schedule was based on weekly regular time and overtime. After this revised schedule had been in operation only a short time, it became evident that it did not work out equitably as to certain employees and, accordingly, after further consultation between the employees the company upon the express insistence of the representatives of the employees, adopted a new [68] schedule of wages and notice of same posted as before, to the effect that on November 1, 1938, the new agreed upon schedule of wages would be put in effect and made retroactive to October 24, 1938, and the notice stated that this new schedule was also adopted to comply with the provisions of said Act.

III.

That during the times referred to in the preceding paragraph hereof this defendant was dealing and conferring with two different unions representing different groups of employees; that neither of said unions had been designated as bargaining agent by the National Labor Relations Board so that neither in fact nor in law was there a single bargaining agency representing the em-

ployees as a whole to deal and confer with, and that both of said unions approved, agreed to and accepted each of the wage schedules referred to in the preceding paragraph and the methods of computing overtime provided in said schedules. That on December 2, 1938, an election was held by defendant's employees in Juneau under the auspices and at the direction of the National Labor Board to determine the collective bargaining agency which should represent this defendant's employees in all matters affecting their relation with said defendant company, including the matter of wages and hours. That as the result of said election Juneau Mine and Mill Workers Union, Local 203, affiliated with International Mine, Mill and Smelter Workers Union, was certified by the National Labor Relations Board as, and became the sole collective bargaining agency with power to deal with said defendant company in all matters affecting each and all of its employees rights under the National labor laws, including questions of wages and hours.

IV.

That on or about the 2nd day of May, 1939, defendant, after negotiations, entered into a written agreement with said Juneau Mine and Mill Workers Union, Local 203, accepting and recognizing said Union as the sole collective bargaining agency representing [69] all of its employees subject to the National labor laws. Said agreement specifically provided that said defendant company might adjust its wage and hour schedule and rates so as

to conform to the requirements of the Fair Labor Standards Act with respect to the payment for overtime and at the same time not to materially change the amount of earnings received by each employee. That upon the insistence of the Union said schedule of wage adjustments already noted in Paragraph II hereof which had been in effect since November 1, 1938, was incorporated in and set forth in said wage agreement, which agreement had been drafted by said Union and formally ratified and adopted by the Union on April 29th, 1939.

V.

The practical operation of this adjusted wage payment procedure was found to be adverse to such employees as might be absent from work during a portion of the work week and, accordingly, the Union, on its own initiative, insisted on the making of a modified agreement which was entered into between this defendant and the Union on October 5, 1939, to meet the demands of the Union. This modified agreement provided that instead of calculating the overtime at the end of each week as had been done prior to October 5, 1939, it was to be figured at the end of each day. Otherwise, the agreement of May 2, 1939, was, by its terms, to continue in force for a period of one year.

VI.

That said change in the manner of payment from a weekly to a daily calculation of overtime, and insisted on by said Union representing all of the employees, including plaintiffs, was consented to and

made operative by this defendant company, as more fully set forth in the preceding paragraph hereof, because the then Administrator of the Wage-Hour Division having the administration of the Fair Labor Standards Act under his supervision had publicly stated on May 10, 1939, that the daily calculation of overtime, as put in operation by the said agreement with the Union of October 5, 1939, was in full compliance with the provisions of the Fair Labor Standards Act, and this [70] statement had been given wide publicity and had come to the knowledge of this defendant (as more fully set forth hereinafter in Paragraph III of the second, further and separate answer, which paragraph is referred to and made a part hereof), as well as to the knowledge of the Union and this defendant's employees. That this defendant made and agreed to said change from a weekly to a daily calculation of overtime in full and sole reliance upon the approval of said method of calculation by said Administrator and said change would not have been made by this defendant had not said Administrator so approved such daily method of calculating overtime.

VII.

On or about May 1, 1940, a new agreement effective until May 1, 1941, was prepared by the Union and submitted to and accepted by this defendant, which agreement also provided specifically for the calculation and payment of regular time and overtime and for its daily computation. This method of calculating and paying wages was included in

said agreement upon the insistence of the Union and was the accepted schedule under which wages were calculated and paid to defendant's employees, including plaintiffs, and each of them, during the entire year from May 1, 1940, to May 1, 1941, and during the periods of time alleged in Paragraph VIII of the first amended complaint that plaintiffs were employed by this defendant.

VIII.

That in all of its dealings with its employees and their representatives and with the Union which was selected by said employees as the sole collective bargaining agency at the election of December 2, 1938, all of which is set forth hereinbefore and more particularly in connection with all of said wage and hour agreements, this defendant company dealt with its employees and their representatives and said Union at arms length and in entire good faith without exercising or attempting to exercise any fraud or undue influence or improper pressure of any sort, but all of said wage and hour agreements were openly arrived at after full and fair discussion by both sides and in their honest belief that [71] these wage and hour schedules were in each instance a full and fair compliance with the provisions of the National labor laws, including those of the Fair Labor Standards Act; that each and all of the wage schedules and wage agreements referred to in this first separate answer and defense, were approved, accepted, agreed to and acted upon by all of this defendant's

employees, including the plaintiffs, and each of them, in this action, and by the Union or Unions representing them at the time said wage schedules and wage agreements became effective.

For a second, further and separate answer and defense to the first amended complaint this defendant alleges:

I.

Defendant incorporates in, and makes a part of this second, further and separate answer and defense, all of the paragraphs and allegations set forth in its first, further and separate answer and defense.

II.

That copies of each of said agreements, shortly after each was entered into, were sent to the Wage-Hour Division of the federal government in Washington, D. C., for its information. That pursuant to specific request of the Federal Wage-Hour Division data consisting in part of photostatic copies of its payrolls which showed on their face in detail the basic wage and overtime wage paid each work week to defendant's employees and from which data the government's representatives could easily determine the method of payment which had been followed by defendant, was also sent to said Division.

III.

That calculating and paying to employees their basic wage and overtime wage on a daily basis was specifically and publicly approved as in compliance

with the provisions of the Fair Labor Standards Act by Elmer F. Andrews, the then Administrator of the Federal Wage-Hour legislation and the Fair Labor Standards Act [72] at a meeting held May 10, 1939, in Washington, D. C., of Congressmen from the mining states, which meeting was convened for the very purpose, among others, of discussing these wage-hour questions and which meeting was also attended by representatives of the mining industry, this defendant being there represented by H. L. Faulkner, one of its attorneys from Juneau, Alaska. That said approval of the method of daily calculation of basic and overtime wages received wide circulation in the mining world and a bulletin setting forth said Andrews' approval of such method was published on May 13, 1939, and widely distributed by the American Mining Congress, one of the leading and recognized mining organizations in the United States.

IV.

That on July 12, 1940, Baird Snyder, then Chief Deputy of the Federal Wage-Hour Division, wrote the Colorado Mining Association at Denver, Colorado, that daily circulation of overtime, totaled at the end of the week, similar to the method followed by this defendant, was permissible under the provisions of the Act.

V.

That as a direct result and consequence of said interpretation of the Act by representatives of the Wage-Hour Division, as aforesaid, such informa-

tion having reached the employees of this defendant, said employees considered it a distinct advantage to them to have their overtime calculated on a daily basis and in October, 1939, through their Union, they insisted that this defendant change its wage schedule so that overtime would be computed daily instead of weekly, as was being done at that time. Acting as a result of the insistence of said Union and relying on the aforesaid interpretation of the Act by the representatives of said Wage-Hour Division, the then existing agreement between the Union and this defendant company was modified and the company [73] began to pay its employees overtime on a daily calculated basis which, in the absence of said favorable opinion by said Administrator, it would not otherwise have done.

For a third, further and separate answer and defense to the first amended complaint, this defendant alleges:

I.

Defendant incorporates in and makes a part of this third, further and separate answer and defense each and all of the paragraphs and allegations of its first and second separate answers and defenses hereinabove set forth.

II.

That on or about December 15, 1940, this defendant received a letter from the regional director of the Wage-Hour Division in San Francisco completely reversing the opinion of said Administrator Andrews and stating that the method fol-

lowed by defendant in paying wages to its employes and calculating overtime on a daily basis was not a compliance with the provisions of the Fair Labor Standards Act and did not meet with the approval of Philip B. Fleming, Administrator and successor to said Elmer F. Andrews, former Administrator. That is this method of calculation and payment of overtime were not changed to payment based on weekly calculation that suit would be instituted by the Government to enjoin the Company from continuing such overtime payments, calculated on a daily basis, and that the Government would also sue in behalf of the Company's employees for alleged additional amounts claimed to be due said employees had their overtime been calculated as the Government claimed it should be calculated, and also for an additional equal amount as liquidated damages.

III.

The Government insisted that in calculating overtime and what it claimed was due defendant's employees by reason of such [74] alleged unpaid overtime the weekly basis of paying overtime which defendant had formerly been paying its employees prior to the change to daily calculated overtime in October, 1939, could not be used, but that such alleged overtime had to be calculated on an entirely new and fictitious basis which the Company and its employees had never agreed on, viz.: the Wage-Hour Administration claimed that the total daily wages, including regular and overtime paid by the Company to its employees after October 5, 1939,

must all be treated as regular wages and that the Company should pay in addition thereto for overtime an hourly rate of time and a half, the said fictitious hourly rate of payment, computed as aforesaid, for all hours worked in each week in excess of those prescribed by the Fair Labor Standards Act as the maximum number of hours for regular pay for that particular year.

IV.

That this defendant sent one of its legal representatives, said H. L. Faulkner, to interview said Administrator, Philip B. Fleming, and endeavor to adjust the matter without litigation. Said Faulkner, in his interview with said Fleming, insisted, and has at all times insisted, that the Company's method of calculating and paying wages on a daily basis was a full and lawful compliance with the provisions of the Fair Labor Standards Act, but said Fleming stated that said threatened suit would be brought in the Federal District Court in West Virginia, the state in which this defendant was incorporated. Upon his return, said Faulkner advised this defendant that the cost of defending such a suit in West Virginia, where defendant would have to employ counsel and pay the expense and transportation of witnesses from Alaska to said state would be very large, and thereupon advised this defendant that a reasonable settlement of the threatened litigation on an amicable basis would be preferable. [75]

V.

At all times this defendant had been advised by said Faulkner and other of defendant's counsel that said charges of Fleming of a violation of the provisions of the Fair Labor Standards Act as aforesaid were erroneous and that this defendant could successfully defend such threatened litigation on many grounds, viz.: that this method of calculating overtime on a daily basis as distinguished from its calculation on a weekly basis, as was being done, was only adopted and followed on the initiation and insistence of the employees and the Union representing them and under a written agreement with said employees openly and fairly entered into and in full reliance upon the publicly expressed opinion of the Administrator of the Wage-Hour Division and his Chief Deputy that said daily method of calculating overtime was entirely lawful and in compliance with the provisions of the Act; that the major activity of the Company was gold mining, which was not subject to the provisions of the Federal labor laws because there could be no competition in commerce in the production of gold; and that the Government, with full knowledge, had allowed the Company to continue to pay its employees wages on that basis without objection.

VI.

That at all times during the negotiations with the representatives of the Wage-Hour Division which followed there was an honest dispute as to whether or not this defendant was lawfully con-

forming to the provisions of the Fair Labor Standards Act in making wage payments to its employees with overtime calculated daily, as above set forth and whether or not there were any sums due to said employees including plaintiffs, or any of them. Because of this honest belief on the part of this defendant acting upon the advice of its counsel, and upon the opinion of said Administrator Andrews, defendant was prepared [76] at all times to defend against any such litigation on all available grounds whether such litigation were brought by its employees or by said Administrator in their behalf. However, when said Administrator Fleming insisted that he would institute said suit in the State of West Virginia, far removed from its principal place of business in San Francisco and from its mining operations in Alaska, defendant's legal counsel advised it that because of the great cost and difficulty of properly defending said threatened suit in West Virginia that if said threatened litigation could be adjusted amicably on acceptable terms it would be to the best interests of defendant to do so. Therefore, acting on said advice and without admitting the validity of any of the charges made, a stipulation was entered into between the Wage and Hour Division, through its then Administrator and this defendant company, and a consent decree entered by this Federal Court, in San Francisco, on April 23, 1941, in an action filed by said Administrator against this defendant (Civil Action No. 218348)

whereby this company agreed to pay each of its employees employed by it at its mine in Juneau, Alaska, for any period of time so employed between December 13, 1940, and May 1, 1941, a sum of money equal to the difference between the amount of wages already paid each respective employee and the amount he would have received for his employment during such period had he been paid in accordance with the interpretation placed upon said Act by said Administrator. That this defendant's understanding and agreement and purpose in entering into said stipulation and consenting to the entry of said decree was solely to avoid costly and expensive litigation in a West Virginia forum where it intended to and would have defended such litigation on all the grounds and defenses available to it, including those above set forth, and said stipulation was entered into without waiver of any defenses and [77] with the understanding and agreement and purpose that it would constitute a settlement for any and all alleged claims that might be advanced by the Government or defendant's employees by reason of any acts or things done, or omitted to be done, by defendant with relation to said provisions of said Fair Labor Standards Act.

That defendant thereafter and within the time specified in said stipulation and judgment based thereon and under the direction and supervision of said Wage and Hour Division, paid to each of said plaintiffs, the following sums of money:

Name	Amount
E. E. Robertson	$112.00
J. A. Behrends	39.78
Marko Dapcevich	37.44
Sam Dapcevich	46.99
R. C. Haydon	109.24
Boyd E. Marshall	56.49
R. W. Marshall	54.00
E. M. Gilligan	99.12
Lynn E. Pope	.....
E. Rundich	39.00
Hal Windsor	121.20
S. Eneberg	.....
Ivan DiBoff	37.44
Paul Cvorovich	44.46
Frank Maver	104.19
Virgil Newell	123.06
W. S. Kljaich	49.59

Each of said above-named plaintiffs duly receipted for the respective amount paid to him.

VII.

In order to avoid further controversy with the Administrator [78] of the Wage and Hour Division on this point defendant has, ever since April 30, 1941, paid its employees, including plaintiffs, and each of them, on a weekly basis of computing overtime instead of on a daily basis as it had been doing theretofore. That the employees through their Union made strenuous objection to the change by this defendant from a daily to a weekly basis of computing overtime wages and only consented to

the change when advised that it was made pursuant to an order of this Court upon request of the Wage and Hour Division. That said settlement was in every way most reasonable and fair to said employees, including plaintiffs, in view of the fact that at all times defendant has maintained and still maintains, that its computation and payment of wages during all of said period when it was paying overtime on a daily calculation basis was lawful and in full compliance with the provisions of the Fair Labor Standards Act. That said payments would never have been made and this defendant would never have consented to the entry of said decree, but would have defended said suit and any other litigation which might have been brought by either the Administrator or any of its employees to recover under the terms of said Act had it not considered that said payments were to be treated as final and in full settlement of any and all alleged claims for further and additional compensation under the provisions of said Act.

Wherefore, defendant, Alaska Juneau Gold Mining Company, prays that it be hence dismissed with its costs of suit.

WM. E. COLBY,
GEO. W. WILSON,
Attorneys for Defendant, Alaska Juneau Gold Mining Company. [79]

(Duly Verified.)
(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Aug. 31, 1944. [80]

[Title of District Court and Cause.]

MEMORANDUM AND ORDER FOR JUDGMENT

Plaintiff sues on behalf of himself and other former employees of defendant to recover overtime payments and liquidated damages alleged by plaintiff to be due under the Fair Labor Standards Act (29 USCA §201). The facts, except as hereinafter specified, are undisputed. Defendant operated a large low grade hard rock gold mine at Juneau, Alaska, for about seventeen years. The rock yielded less than $1.00 a ton, so that it was necessary for defendant to keep operating costs low. It suspended operations in 1944 due to operational losses over a period of approximately a year. The general superintendent of the company testified [91] that the employees were paid wages higher than those paid by any other large hard rock mine anywhere.

When the Fair Labor Standards Act became effective on October 24, 1938, wages formerly paid on the basis of an eight hour day were adjusted to conform to the Act's provision for overtime for hours worked in excess of 44 hours a week, by reducing the hourly rate of pay so that, when added to the overtime rate of pay, or time and a half, it resulted in the employees receiving the same or slightly more wages than they were previously paid. Wages were computed on a weekly basis. This method of computations was held to be proper in Walling v. Belo Corp., 316 U. S. 624, 630. In November of 1938, the wages were increased a few cents to compensate the em-

ployees for loss of time due to enforced lay-offs. In January, 1939, after an election, the CIO was designated as the bargaining unit for the employees. In May of 1939 the company entered into its first formal agreement with the union, continuing in effect the same method of payment, with the same rates of pay as were fixed in November of 1938. The agreement provided for renegotiation of its terms upon thirty days notice. Under the weekly plan of payment a man who laid off for a day lost overtime for the week to the extent of his hours of absence. Defendant contends that for this reason the union notified the company that it wished to renegotiate this part of the contract, and demanded that the split-day plan of payment be inaugurated, in place of the weekly method of calculation then in force. Mr. Faulkner, the attorney for the company, conferred in Washington with Mr. Andrews, the then Administrator of the Wage and Hour Division, with [92] regard to the legality of such a plan. The Administrator stated publicly that such a plan was legal and authorized. Plaintiff contends that the plan "was the company's brain-child, not the creature of the union." However, the contention of defendant is supported by the fact that the split-day plan resulted in an increased overall cost to the company, and by the following testimony on the part of plaintiff: "Mr. Colby: Did you know by any meanas afterwards or before the union had requested the company to put this split-day plan into operation? A. I heard it discussed probably many times, but it was—the request was made before I knew it was

made. * * * The Court: You knew there was a demand made? A. Yes." Defendant's contention that the demand for the change was made by the union is further supported by the recital in the ensuing agreement of October 5, 1939, between the company and the union: "The union has submitted to the company a proposal for computation of pay on the basis of a seven hour day with time and a half for all in excess of said seven hours and the wage scale or schedule based thereon, which proposal the company has accepted." The agreement provided for a daily rate of pay at seven hours regular time and one hour overtime, based on a 42 hour week. The effect of the new wage scale was that an employee who worked a full week received the same amount or slightly more than he received under the agreement of May 2, 1939, whereas a man who laid off during the week received substantially more than he would have received under the weekly method of computing overtime, because he accumulated overtime by the day rather than by the week. Thus the company paid a greater total amount in wages than it had paid under the original plan. [93]

In May of 1940 a new agreement was entered into, altering the basis of calculating the daily rate to 6.6 hours regular time and 1.4 hours overtime, to meet the provision in the Act reducing working hours from 42 to 40 hours per week as of October 24, 1940. This resulted in a slight increase to the employees because of the fractional split of 6.6 hours regular time and 1.4 hours overtime, rather than of 6-2/3 and 1-1/3.

In December of 1940 the Wage and Hour Division notified the company that the split-day plan of computing wages was a violation of the Act, and threatened to sue the company in West Virginia, the state of its incorporation. The overtime which the Administrator claimed was due was computed by adding regular pay and overtime pay for the split day and adding additional time and a half for the last eight hours of the week. A stipulated judgment was entered in this court (Fleming v. Alaska Juneau Gold Mining Company, No. 21,834-S) for overtime payments to the employee from the date of the notification by the Wage and Hour Division to May 1, 1942, the date of the change back to the weekly plan of computation. The stipulation upon which the judgment was based recited that "defendant enters into this stipulation solely for the purpose of settling this action without contest, and does not admit any of the allegations of the complaint." Defendant paid its employees the amounts provided for in the stipulated judgment, and in May of 1941 changed back to the 40 hour week base pay and eight hours overtime. The present action seeks liquidated damages for the period covered by the judgment in the Fleming case, and overtime and liquidated damages from April 23, 1940, to December 13, 1940. This [94] court has heretofore held that the statute of limitations has run on claims accruing prior to April 23, 1940.

The vadility of the original weekly plan for computation of overtime is not questioned, and is supported by the decision of the Supreme Court in

Walling v. Belo Corp., 316 U. S. 624. There the court had before it a similar weekly plan of overtime computation. The court said, "It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit, as far as possible, the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages as they received previously, so long as the new rate equals or exceeds the minimum required by the Act."

The question here is whether by complying with the demand of the employees that the split-day plan be adopted, under which plan the employees received as much, and in many cases, more than they received under the former weekly plan of overtime computation, defendant violated the Act.

Plaintiff relies on Walling v. Helmerich & Payne, 65 S. Ct. Rep. 11, as authority that the split-day plan in the present case was illegal. In that case the employees had been paid specified wages for each shift of eight, ten or twelve hours daily. After the passage of the Act the first four hours of the eight hour shifts and the first five hours of the ten and twelve hour shifts were designated as "base or regular rate" and the remaining hours as overtime. The effect of the plan was that an [95] employee would be required to work eighty hours a week before he would be entitled to overtime in excess of his former rate of pay. The Supreme Court said, "The actual and regular workweek was accordingly shorn of all sig-

nificance. * * * Respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first forty hours actually worked. Instead the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received. This illusory rate was arbitrarily allocated to the first portion of each day's regular labor; the latter portion was designated 'overtime' and called for compensation at a rate one and one-half times the fictitious regular rate. * * * The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours. It was derived not from the actual hours and wages but from ingenious mathematical manipulations, with the sole purpose being to perpetuate the pre-statutory wage scale."

In the present case the contract regular rate was not fictitious or illusory. On the contrary it was legally established by defendant and later agreed upon by the union in the contract of May 2, 1939. Overtime was actually paid at one and one-half times the bona fide regular rate, and employees who worked no overtime received only the regular rate of pay. Therefore the plan in the present case did not have the "vice" found by the court in the [96] Helmerich case. The adoption of the split-day plan was demanded by the union because it was advan-

tageous to employees who were required for any reason to lay off work. It penalized no one but the defendant. It would be incredible if the mere use of the word "split-day" would have the magic power to render illegal a labor contract which was previously legal, even though wages paid thereunder remained the same or were increased. I think the present case does not fall within the rule of the Helmerich case. I conclude that defendant's dealings with its employees were lawful and in good faith, and that plaintiff and the other employees on whose behalf he sues are not entitled to recover.

Defendant reserves, but does not seriously urge, the objection that its operations wer not in interstate commerce and that therefore its employees were not covered by the Act. The mining of gold and its transportation across state or territorial lines has been held to constitute commerce within the meaning of the Act. Fox v. Summit King Mines (C.C.A. 9) 143 F. (2d) 926; Walling v. Haile Gold Mines, 136 F. (2d) 102; Sunshine Mining Co. v. Carver, 41 F. Supp. 60. In view of the decision in the present case, it is unnecessary to discuss this question at length.

Upon the day of the trial plaintiff moves for the first time to join as plaintiffs forty additional former employees of defendant. Defendant interposed vigorous objection to such joinder. The statute of limitations had at the time of trial run against the claims of the persons sought to be joined. The motion was untimely, and to grant it would be prejudicial to defendant.

It is therefore [97]

Ordered:

1. Defendant may have judgment as prayed for with costs.

2. Plaintiff's motion to join additional parties plaintiff is denied.

Defendant may submit findings of fact and conclusions of law in accordance with this memorandum.

Dated: May 28, 1945.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed May 29, 1945. [98]

[Title of District Court and Cause.]

PROPOSED AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now comes plaintiffs by Bertram Edises of the firm of Gladstein, Grossman, Sawyer & Edises, and proposes that the Findings of Fact and Conclusions of Law heretofore submitted by the defendant, the prevailing party, be amended in the following respects.

I.

By striking out Paragraph I thereof.

II.

By striking out from Paragraph II, lines 30, 31

and 32, the words, "to conform to the Act's provision for overtime for hours worked in excess of 44 hours a week," and inserting in place thereof, the words, "to avoid the increase in weekly wages which [99] the employees would otherwise have obtained as a result of the operation of the Act."

III.

By striking out the provisions of Paragraph V.

IV.

By striking from Paragraph VI, lines 2 and 3, the words "As a result of this demand and insistence of the union"; by striking from lines 21 through 24, the words, "Under the new wage scale the company paid a greater total amount of wages than it has been paying under the weekly method of computation, and the men correspondingly benefited."

V.

By striking from Paragraph VII, lines 30 and 31, the words, "in order to meet the provision of the Act reducing the weekly hours of regular employment from 42 to 40 hours," and inserting in lieu thereof the words, "in order to avoid the increase in weekly wages which would otherwise have accrued to the employees as a result of the lowering of the statutory maximum workweek from 42 to 40 hours"; by striking from page 4 the provisions of lines 1 to 9 inclusive.

VI.

By adding the following to Paragraph VIII, "The opinion of Mr. Andrews was not set forth as

a formal opinion of the Wage and Hour Division, and was expressly stated to be his private, confidential view. The conferees were aware that Mr. Andrews' informal interpretation was debatable and that they ran the risk of having it reversed."

VII.

By striking out Paragraph XIII.

VIII.

By striking out Paragraph XIV. [100]

IX.

By adding the following paragraph:

Defendant's employees have always worked in regular shifts of eight hours a day and either six or seven days a week, being a weekly total of forty-eight or fifty-six hours. The employees continued to work a regular eight hour shift throughout all the various changes in wage rates described herein.

X.

By adding the following paragraph:

Prior to October 24, 1938, the effective date of the Act, defendant paid its employees a daily rate, with no extra or overtime compensation on a weekly basis for time worked in excess of any given number of hours per week. Thus, a man paid $5.00 per eight hour day would receive $30.00 for six days work and $35.00 for seven days work.

XI.

By adding the following paragraph:

When the Act went into effect, and it conse-

quently became necessary for defendant to pay time and one-half for hours in a week in excess of forty-four, defendant revised its wage rates downward for the purpose of preventing an increase in the employees' weekly wages.

XII.

By adding the following paragraph:

In October, 1939, when the forty-two hour maximum week came into effect under the Fair Labor Standards Act, the Company and the Union entered into an agreement for the adoption of a split-day method of payment. The normal workday of eight hours was arbitrarily divided into two segments of seven hours and one hour, respectively. The first seven hours were labelled "straight time", the eighth hour was labelled "overtime." Thus, when an employee had completed the statutory maximum of forty-two hours in a given [101] workweek, the Company's books credited him with thirty-seven hours of "straight time" and five hours of "overtime." Hence, when the forty-third hour was worked, it would be paid for at "straight time" rather than "overtime" rates.

XIII.

By adding the following paragraph:

When the forty hour week went into effect in 1940, the workday was again arbitrarily redivided and hourly rates redetermined so as to keep weekly earnings down to their previous totals and avoid the weekly wage increase which would otherwise have resulted from the operation of the Act. In this case

the division was into 6.6 "straight time" hours and 1.4 "overtime" hours. The employees continued to work the same number of hours as before and to receive approximately the same amount of money in their weekly pay envelopes.

XIV.

By adding the following paragraph:

The first mention in the record of the split-day plan of wage payment was on May 10, 1939, when Mr. Faulkner, representing defendant, together with other representatives of the mining industry met with Administrator Andrews and asked him for an opinion as to the legality of the split-day plan.

XV.

By adding the following paragraph:

Defendant is engaged in Juneau, Alaska, in the mining, milling, sale and distribution of gold, silver and lead. Large quantities of these products are transported in interstate commerce. Gold Bullion is consigned to the United States Assay Office at Seattle, Washington, and concentrates are consigned to the American Smelting and Refining Company at Selby, California.

XVI.

By adding the following paragraph:

The employee plaintiffs in this case were performing functions [102] which were an essential part of or were necessary to the mining or preparation or transportation of the various metals dealt in by the defendant.

XVII.

By adding the following paragraph:

None of the plaintiffs herein participated in any negotiations with the defendant in regard to the adoption of the split-day plan of wage payment.

XVIII.

By adding the following paragraph:

None of the plaintiffs herein were a party to the injunction suit brought by the Wage and Hour Division in which the defendant made partial reimbursement to its employees for unpaid overtime compensation.

PROPOSED AMENDMENTS TO CONCLUSIONS OF LAW

Plaintiffs propose the following amendments to the Conclusions of Law heretofore submitted by defendant:

I.

By striking out all of the provisions of Paragraphs I, II, III, IV and V of said Conclusions of Law.

II.

By adding the following paragraph:

The so-called overtime and straight time rates paid by defendant pursuant to the wage agreements of October 5, 1939 and May 1, 1940, were not bona fide genuine rates, but were fictitious rates, utilized by the defendant for the purpose of avoiding an increase in the employees' weekly wages as a result of the operation of the Fair Labor Standards Act.

III.

By adding the following paragraph: [103]

The employee's regular rate of pay under the aforesaid contracts is computed by dividing the wages received for each eight hour shift by the number of hours worked in each such shift.

IV.

By adding the following paragraph:

The division of the normal eight hour shift into two parts and the payment of different rates for each part resulted merely in the establishment of two different hourly straight time rates.

V.

By adding the following paragraph:

No equitable estoppel has arisen by reason of the facts herein which bars plaintiffs from any recovery in this action.

VI.

By adding the following paragraph:

Plaintiffs are entitled to be paid overtime compensation together with an equal amount as liquidated damages, for the period referred to in the amended complaint herein.

VII.

By adding the following paragraph:

Division of the workday into two parts, as set forth above, and the resulting method of computation and payment of wages, violated the Fair Labor Standards Act.

ORDER FOR JUDGMENT

It is ordered that judgment be entered for plaintiffs against the Alaska Juneau Gold Mining Company for overtime compensation and equal amounts of liquidated damages in accordance with the principles set forth herein, together with the sum of $..... as attorney's fees and costs of suit.

.....

United States District Judge.

(Affidavit of Service by Mail.)

[Endorsed]: Filed June 16, 1945. [104]

[Title of District Court and Cause.]

ORDER RE PROPOSED AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ordered:

Plaintiffs' proposed amendments to findings of fact and conclusions of law submitted by defendants are granted and denied as follows:

1. Proposed amendments Nos. IX, XIV, XV and XVI to the findings of fact are granted.

2. Proposed amendment No. I to the conclusions of law is granted only with respect to paragraph III of said conclusions of law.

3. The remainder of the proposed amendments

to said findings of fact and conclusions of law are denied.

Dated: August 6, 1945.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Aug. 8, 1945. [105]

In the United States District Court, for the Northern District of California, Southern Divion

No. 22658-S

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, et al.,

Plaintiffs,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a corporation, et al.,

Defendants.

JUDGMENT

The above entitled cause having come on regularly for trial before the above entitled Court, Honorable A. F. St. Sure presiding, Bertram Edises, appearing for the firm of Gladstein, Grossman, Sawyer, and Edises, on behalf of the plaintiffs and William E. Colby and George W. Wilson, appearing on behalf of the defendant, Alaska Juneau Gold Mining Company, a corporation, and evidence oral and documentary having been taken, and the cause having

been argued by the respective parties and submitted to the Court for decision, and the Court having made and filed its decision ordering entry of a judgment: Now, therefore, it is Ordered and Adjudged that plaintiffs take nothing by reason of this action, and that defendant be hence dismissed with its costs of suit amounting to the sum of $146.10.

Dated the 23rd day of August, 1945.

A. F. ST. SURE,

United States District Judge.

Approved as to form as provided in Rule 5 (d).

Dated: August 21, 1945.

GLADSTEIN, GROSSMAN,

SAWYER & EDISES,

By HAROLD M. SAWYER.

[Endorsed]: Filed August 23, 1945. [107]

[Title of District Court and Cause.]

DISBURSEMENTS

Clerk's fee, U. S. Dist. Court $15, S. F. Superior Court, 1st appearance fee $2, certified copy record on removal $2	$19.00
Reporter's fees	6.50
Witness fees:	
H. L. Faulkner, Juneau, Alaska, mileage to limit district $40.30, subsistence and time three days travel and attendance @ $5., $15.00	55.30
J. A. Williams, Juneau, Alaska, mileage to limit district $40.30, subsistence and time three days travel and attendance @ $5., $15.00	55.30
Certified Copy record Fleming v. Alaska Juneau #21,834-S introduced as defendants (Ex. B-1, B-2, B-3)	2.50
Premium on removal bond U. S. Guarantee Company	7.50
Total	$146.10

Taxed at $146.10.

C. W. CALBREATH,

Clerk.

No appearance on behalf of Plain. 9/7/45 at 10:10 a.m.

United States of America,
Northern District of California—ss.

Geo. W. Wilson being duly sworn, deposes and says: That he is one of the attorneys in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements; that the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause; and that the services charged therein have been actually and necessarily performed as therein stated.

G. W. WILSON.

Subscribed and sworn to before me this 4th day of September, A. D. 1945.

(Seal) WM. J. CROSBY,
Deputy Clerk, United States District Court, Northern District of California. [108]

To E. E. Robertson, as representative of and on behalf of J. A. Behrends, et al., and to Gladstein, Grossman, Sawyer and Edises, their attorneys:

You will please take notice that on Friday, the 7th day of September, A. D. 1945, at the hour of 10:00 o'clock a.m., defendant, Alaska Juneau Gold Mining Company, will apply to the clerk of said Court, to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said Court, in such case made and provided.

WM. E. COLBY,
G. W. WILSON,
Attorneys for said Defendant.

Service of within memorandum of costs and disbursements and receipt of a copy thereof acknowledged this 4th day of September, A. D. 1945.

GLADSTEIN, GROSSMAN,
SAWYER & EDISES,
Attorney for Plaintiffs.

[Endorsed]: Filed Sept. 4, 1945. [109]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that the plaintiffs in the above-entitled action hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered on the 23rd day of August, 1945, in favor of the defendants herein.

Dated this 19th day of November, 1945.

GLADSTEIN, GROSSMAN,
SAWYER & EDISES,
Attorneys for Appellants.

[Endorsed]: Filed Nov. 20, 1945. [110]

[Title of District Court and Cause.]

STIPULATION DESIGNATING PORTIONS OF RECORD TO BE CONTAINED IN THE RECORD OF APPEAL

To the Clerk of the Above-Named Court:

A. In accordance with Rule 75 (f) of the Federal Rules of Civil Procedure, the parties hereto designate the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Complaint filed April 23, 1943, in the Superior Court, in and for the City and County of San Francisco, State of California.

2. Petition for Removal of Cause to Federal Court, filed May 5, 1943.

3. Order of Removal dated May 6, 1943.

4. Motion to Dismiss and for More Definite Statement, filed June 28, 1943.

5. Memorandum and Order dated October 11, 1943. [111]

6. First Amended Complaint, filed May 4, 1944.

7. Amendment to First Amended Complaint, filed July 14, 1944.

8. Answer of Defendant Alaska Juneau Gold Mining Company to First Amended Complaint, as Amended, filed August 28, 1944.

9. Motion to Amend First Amended Complaint, as Amended, filed January 11, 1945.

10. Reply to Motion to Amend First Amended Complaint, as Amended, filed January 12, 1945.

11. Memorandum and Order for Judgment dated May 28, 1945.

12. Defendants' Findings of Fact and Conclusions of Law.

13. Plaintiffs' Proposed Amendments to Findings of Fact and Conclusions of Law.

14. Order re Proposed Amendments to Findings of Fact and Conclusions of Law dated August 6, 1945.

15. Judgment, dated and entered August 23, 1945.

16. Memorandum of Costs and Disbursements filed September 4, 1945.

17. Entire Reporter's Transcript of the Trial.

18. Exhibits Nos. 1, 3-A to 3-S inclusive, and 4.

19. Exhibits A, B-1, B-2, B-3, C, D, E, F, G, H, I and J.

20. Notice of Appeal filed November 20, 1945.

21. This Stipulation Designating Portions of Record to be Contained in the Record on Appeal.

22. Stipulation and Order for Transmittal of Certain Original Exhibits to Appellate Court, dated December 11, 1945.

23. Stipulation for Withdrawal of Original Exhibits Transmitted to Appellate Court, dated December 11, 1945.

B. Certain of the original exhibits mentioned above, instead of copies, shall be included in the record on appeal, and in accordance with the court's order dated December 18, 1945, you need not prepare copies thereof. [112]

C. The parties hereto stipulate and agree that the record on appeal shall consist of the record, proceedings and evidence hereinabove specified.

Dated this 4th day of December, 1945.

GLADSTEIN, SAWYER & EDISES

By /s/ EWING SIBBETT
Attorney for Plaintiffs.

WILLIAM E. COLBY
GEORGE WILSON

By WM. E. COLBY
GEORGE WILSON
Attorneys for Defendants

[Endorsed]: Filed Dec. 13, 1945. [113]

[Title of Court and Cause.]

STIPULATION FOR WITHDRAWAL OF ORIGINAL EXHIBITS TRANSMITTED TO CIRCUIT COURT

It is hereby stipulated by and between the parties hereto that upon approval of the Appellate Court, the original exhibits transmitted to the Appellate Court as part of the record on appeal may be with-

drawn and returned to the District Court for use of plaintiffs and defendants in preparing their briefs on appeal.

Dated this 11th day of December, 1945.

GLADSTEIN, SAWYER & EDISES

By /s/ EWING SIBBETT

Attorneys for Plaintiffs.

WILLIAM E. COLBY
GEORGE WILSON
WM. E. COLBY

By GEORGE WILSON

Attorneys for Defendants

[Endorsed]: Filed Dec. 13, 1945. [114]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMITTAL OF CERTAIN ORIGINAL EXHIBITS TO APPELLATE COURT

Whereas certain of the original exhibits in this case are voluminous and are of such a nature that they cannot conveniently be copied by the Clerk for inclusion in the record on appeal; and

Whereas such original exhibits should be inspected by the Appellate Court.

Now, therefore, It Is Hereby Stipulated by and between the parties hereto that, subject to the approval of the Court herein, Exhibits Nos. 1, 3-A to 3-S inclusive, 4, A, B-1, B-2, B-3, E, F, G, and H be transmitted by the Clerk to the Appellate

Court in their [115] original form, in the same manner and at the same time as the remainder of the record on appeal.

Dated this 11th day of December, 1945.

GLADSTEIN, SAWYER & EDISES

By /s/ EWING SIBBETT

Attorneys for Plaintiffs

WILLIAM E. COLBY

GEORGE WILSON

By WM. E. COLBY,

GEORGE WILSON

Attorneys for Defendants

So Ordered.

A. F. ST. SURE

Judge of the District Court

Dated this 18 day of December, 1945.

[Endorsed]: Filed Dec. 18, 1945. [116]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the Appellants herein may have to and including February 8, 1946, to file the Record on Apepal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: December 22, 1945.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Dec. 27, 1945. [117]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and including February 18, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: February 8, 1946.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Feb. 8, 1946. [118]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause, having come on regularly for trial before the above entitled Court, Honorable A. F. St. Sure presiding, Bertram Edises, appearing for the firm of Gladstein, Grossman, Sawyer and Edises, on behalf of the plaintiffs, and William E. Colby and George W. Wilson, appearing on behalf of the defendant, Alaska Juneau Gold Mining Company, a corporation, and evidence oral and documentary having been taken, and the cause having been argued by the respective parties and submitted to the Court for decision, the Court being fully advised in the premises, having heretofore on

May 28th, 1945, filed its opinion herein, makes the following findings of fact:

I.

Defendant operated a large low-grade hard rock gold mine at Juneau, Alaska, for about seventeen years. The rock yielded less than $1.00 a ton, so that it was necessary to keep operating costs low. The percentage of gross value of metals recovered was 96.23% gold, 1.56% silver, and 2.21% lead, which was shipped in the form of gold bullion and concentrates from Alaska to the States. It suspended operations in 1944, due to operational losses over a period of approximately one year. The employees, while the mine was operating, were paid wages higher than those paid by any other large hard rock gold mine anywhere.

II.

When the Fair Labor Standards Act (52 Stat. 1060) became effective on October 24th, 1938, wages formerly paid on the basis of an eight hour day were adjusted to conform to the Act's provision for overtime for hours worked in excess of 44 hours a week, by reducing the regular hourly rate of pay so [120] that, when added to the overtime rate of pay, or time and a half, it resulted in the employees receiving the same or slightly more wages per week than they had previously received. November 1st, 1938, the wages were increased a few cents to compensate employees who lost time due to enforced lay-offs.

III.

During the period just referred to there were two rival unions claiming to represent different factions, and no formal written wage agreement was entered into, but in January, 1939, an election was held under government auspices, and as a result the CIO was designated as the recognized official bargaining agency for the employees.

IV.

On May 2, 1939, the company entered into its first formal wage agreement with the union, continuing in effect the same method of payment of regular time for the first 44 hours per week and overtime for excess hours and with the same rates of pay as were fixed by the company November 1, 1938. This agreement provided for renegotiations of its terms upon 30 days' notice.

V.

Taking advantage of this provision, the union notified the company that it wished to renegotiate the method of computing wages because under the weekly plan of computation a man who, for any reason, laid off for a day or more during the week had those hours of absence deducted from his total hours for the week, which resulted in corresponding loss of overtime. The union, hearing that a split-day plan of calculating wages had been adopted in Butte, Montana, demanded that a similar system, which would obviate loss of overtime for men who laid off during the week, be inaugurated in place of the weekly method of calculation then in force.

VI.

As a result of this demand and insistence of the union, the wage agreement of May 2, 1939, was modified and its wage provisions superseded by a new agreement entered into October 5, 1939, which provided for a daily computation of pay on the basis of seven hours regular time and one hour overtime for six day men and six hours regular time and two hours overtime for seven day men, all based on a 42 hour week. This agreement contained the following recital: "The union has submitted to the company a proposal for computation of pay on the basis of a seven hour day with time and a half for all in excess of said seven hours and the wage scale or schedule based thereon, which proposal the company has accepted."

The effect of the new wage scale was that an employee, who worked a full week, received the same amount, or a few cents more, than he received under the May 2, 1939, agreement, whereas a man, who laid off during the week for a day or two, received substantially more than he would have received under the weekly method of computing overtime because he accumulated overtime daily and it would not be cancelled by such absence as it would when calculated weekly. Under the new wage scale the company paid a greater total amount of wages than it had been paying under the weekly method of computation, and the men correspondingly benefited.

VII.

May 1, 1940, a new wage agreement was entered

into, altering the basis of calculating the daily rate to 6.6 hours regular time and 1.4 hours overtime for six day men and 5.7 hours regular time and 2.3 hours overtime for seven day men, in order to meet the provision of the Act reducing the weekly hours of regular employment from 42 to 40 hours, effective [122] October 24, 1940. The company thus gave the men the benefit of this 40 hour limitation commencing May 1, 1940, instead of waiting until October 24, 1940, when the statutory provision became mandatory, and also gave the men the benefit of the difference between the fractional split of 6.6 hours regular time and 1.4 hours overtime, rather than 6 2/3 and 1 1/3, as it would have worked out if calculated with exactitude, thus increasing the men's pay correspondingly by reason of both concessions by the company.

VIII.

Mr. Faulkner, representing defendant, was in May, 1939, in Washington, D. C., and at a meeting of Congressmen and mine representatives heard Andrews, then Administrator of the Wage and Hour Division having charge of the administration of the Fair Labor Standards Act, state publicly that the split-day plan of paying wages was valid and in compliance with the Act, and Faulkner so advised this defendant.

IX.

On December 13, 1940, the company's office in San Francisco received a notice from the Wage and Hour Division, which was administering the Act, stating that in its opinion the split-day plan

of computing wages was a violation of the Act, and the Administrator of the Wage and Hour Division, Philip B. Fleming, later threatened to sue the company in West Virginia, the state of its incorporation, which would have meant considerable additional expense to the company because of transportation and expenses of witnesses and counsel.

X.

To obviate the threatened suit in West Virginia, a [123] stipulated judgment was entered in this court (Fleming vs. Alaska Juneau Gold Mining Company, No. 21,834-S) on April 23, 1941, and the men employed by the company subsequent to December 13, 1940, and up until May 1, 1941, were paid respectively by the company for overtime claimed by the Wage and Hour Division to be due them during this period. The stipulation upon which said judgment was based recited that "defendant enters into this stipulation solely for the purpose of settling this action without contest, and does not admit any of the allegations of the complaint."

XI.

On May 1, 1941, a wage agreement was entered into whereby the company went back to the practice in effect prior to October 5, 1939, of computation of wages on a weekly basis with overtime for all hours over 40.

XII.

The present action seeks liquidated damages for the period covered by the judgment and settlement

in the Fleming case, and overtime and liquidated damages for the period from April 23, 1940, to December 13, 1940. This court has heretofore held that the statute of limitations has run on all claims accruing prior to April 23, 1940.

XIII.

The contract rates in the present case inaugurated in the wage agreements of October 5, 1939, and May 1, 1940, were genuine, bona fide rates actually used in computing the wages paid the men during the periods of time those respective agreements were in effect, and those rates both the regular or straight time rates and the overtime rates so prescribed were [124] in no sense fictitious, illusory, artificial, unrealistic or so-called "bookkeeping" rates. Overtime was actually paid at one and one-half times the bona fide regular rates, and employees, who did not work sufficient hours per day to become entitled to overtime pay under the respective agreements, received pay computed on the regular or straight rates only, and were not paid any overtime. The adoption of the split-day plan was demanded by the union because it was advantageous to the employees, who were required for any reason to lay off work. Under the plan, those employees received substantially more pay than they had previously under the weekly method of computation, which the split-day plan superseded, and most of the employees, who worked full time, received a small advance. No employees received less than they had received under the previous plan. The regular

rates under the weekly plan of payment, which preceded the inauguration of the split-day plan were substantially identical with the regular or straight time rates, which were put into effect under the split-day plan, and the regular or straight time rates established by the split-day plan agreements were substantially identical with the regular or straight time rates adjusted to compensate for the successive changes to a 42 and 40 hour week, which would have been established had the prior practice of weekly computation of overtime been continued during the period in which the split-day plan agreements were in effect. The wage agreements providing for the split-day plan of computing wages were bona fide agreements entered into as a result of genuine negotiations between the union and the company and were entered into at the insistence of the union. These agreements were advantageous to the employees and would not have been put in force by the company but for the insistence of the union. By reason of the acceptance of this plan and payment of wages in accordance therewith, the company suffered a [125] distinct monetary detriment and disadvantage.

Under both methods of payment, the split-day and the weekly plan, the hours of regular time and of overtime as well as the regular and overtime rates, were substantially, and in most cases actually, identical. Throughout, in dealing with its employes the defendant company has exercised good faith and has made no attempt to coerce or force

the men to enter into any agreements to their disadvantage.

XIV.

The statute of limitations had long since run so as to bar all of the claims of the 40 additional persons, who on the morning of the day of trial sought by motion to be added as plaintiffs. No excuse for this unreasonable delay was offered by their counsel. Plaintiffs were put on notice by defendant by its motion of June 28, 1943, that defendant would object to the joinder of additional plaintiffs in this action unless additional plaintiffs were added with reasonable diligence. To have granted plaintiffs' motion would have caused defendant serious inconvenience and additional expense.

XV.

Defendant's employees have always worked in regular shifts of eight hours a day and either six or seven days a week, being a weekly total of forty-eight or fifty-six hours. The employees continued to work a regular eight hour shift throughout all the various changes in wage rates described herein.

XVI.

The first mention in the record of the split-day plan of wage payment was on May 10, 1939, when Mr. Faulkner, representing defendant, together with other representatives of the mining industry met with Administrator Andrews and asked him for an opinion as to the legality of the split-day plan. [126]

XVII.

Defendant is engaged in Juneau, Alaska, in the mining, milling, sale and distribution of gold, silver and lead. Large quantities of these products are transported in interstate commerce. Gold bullion is consigned to the United States Assay Office at Seattle, Washington, and concentrates are consigned to the American Smelting and Refining Company at Selby, California.

XVIII.

The employee plaintiffs in this case were performing functions which were an essential part of or were necessary to the mining or preparation or transportation of the various metals dealt in by the defendant. [127]

CONCLUSIONS OF LAW

From the foregoing findings of fact, the court makes its conclusions of law as follows:

I.

The contract regular or straight time and overtime rates specified in the wage agreements of October 5, 1939, and May 1, 1940, were bona fide, genuine rates actually used by defendant in computing and paying plaintiffs wages, and were the regular rates at which they were employed within the meaning of the Fair Labor Standards Act, and were not fictitious, illusory, artificial, unrealistic or so-called "bookkeeping" rates.

II.

Defendant's dealings with its employees including plaintiffs and the method of computing and paying wages under said wage agreements were lawful and valid and did not constitute any violation of the Fair Labor Standards Act.

III.

Defendant has fully paid plaintiffs and each of them all sums due them and each of them for wages or any other lawful claims required by the Fair Labor Standards Act, and there is not now due said plaintiffs or any of them any sum or sums by reason of said Act or the allegations of the complaint as finally amended.

IV.

The 40 additional parties, who sought on motion made on the day of trial to be added as parties plaintiff, are not nor is any of them entitled to join in this action. [128]

ORDER FOR JUDGMENT

It is ordered that defendant be hence dismissed with its costs of suit, and that plaintiffs take nothing by reason of this action.

Dated Feb. 15, 1946.

A. F. ST. SURE
United States District Judge

(Acknowledgment of Service attached.)

[Endorsed]: Filed Feb. 15, 1946. [129]

[Title of District Court and Cause.]

Before: Hon. H. F. St. Sure, Judge.

REPORTER'S TRANSCRIPT OF RECORD

Friday, January 12, 1945

Counsel Appearing: For Plaintiffs: Gladstein, Grossman, Sawyer and Edises, by Bertram Edises, Esq. For Defendants: William E. Colby Esq.

The Clerk: Robertson v. Alaska Juneau Mining Co. [132]

I might add to that, in view of what counsel has said here, there is going to be a very serious difference of opinion as to what the plaintiffs will be compelled to prove here. Our contention will be they cannot rely upon this evidence that has been presented here, but they will have to show additional facts in order to bring these plaintiffs here before the Court. In the first place, they will have to show that this person who brings the action as representative is actually the representative, and counsel has requested me to stipulate that he is. I have refused to stipulate, and it then devolves upon the plaintiff Robertson to make that proof.

The Court: May I not take under submission this application that has just been made, and since witnesses are here from Alaska, hear such evidence as you wish to produce in the original Robertson case that has been filed?

Mr. Colby: That, of course, is entirely up to your Honor. However, I think it would be a great injury to us to compel [144] us to proceed.

The Court: I am not compelling you to proceed, so far as this application which has just been presented is concerned—proceed no further than to argue, as you have, that this application should be denied.

Mr. Colby: That is true.

The Court: I think I should like to look into it a little bit further. My inclination now is to deny it. It is not timely. The application is not timely. There is considerable force in the objections you have stated to me. My thought is that I should reserve my ruling upon the application which has just been presented, and to take such evidence as can be presented here today by these witnesses from Alaska on the case as originally filed.

The Court: With that understanding let us proceed.

Mr. Edises: Your Honor, a subpena duces tecum was issued to the corporation for the production of certain data pertaining to the interstate commerce operations of the company. May I ask whether that is available?

Mr. Colby: If your Honor please, I talked this over with Mr. Edises and told him that it would be a burden on the court, and also on counsel as well, to bring in all these records, because they are very extensive, cover a considerable period of time, and told him that we would prepare a summary of what he wants, which I think will give in very short form exactly [145] the information he desires. Here is first, "The Alaska Juneau Gold Mining Company, Cost of marketing product

shipped from Territory of Alaska," covering the metallic bullion bars consigned to the assay office in Seattle, Washington, and the bullion consigned to the American Smelting & Refining Company at Selby. There is the original, and a copy for you. Then I have also had prepared a summary, "Gold, Silver and Lead recoveries from products of Alaska Juneau Mine," which has been totaled, and also the percentages of gold, silver and lead that was extracted from these ores also noted, which would not have been noted on the record, but we have made the calculation there so that it would be more easily available.

I also have here a summary of the gold, silver and lead recoveries contained in the product transported from the Territory of Alaska. The other one was the amount that was mined, that was actually in the ores, and this is the amount transported, and also the relative percentages transported, of course, to the same places indicated in the first sheet.

Now, we have the original sheets that cover most of this, here. It was a loose leaf book that contained that, and if counsel wishes to go behind the summary that we have furnished, this recapitulation, we are perfectly willing that he should examine those, though it would encumber the records of the Court to have them put into the record, and we should dislike to have the records of the company put into evidence if that [146] can be avoided.

Mr. Edises: In connection with this offer, I would like to mention another point that perhaps

slipped counsel's memory. At the time we had our telephone discussion about the production of these records of interstate commerce, counsel pointed out to me that it would be difficult, cumbersome to burden the records with this data, and I told Mr. Colby that we were not desirous of embarrassing him or putting him to any unnecessary effort. I told him that I was faced with a similar problem, that obviously the best evidence of the authority of these beneficiary plaintiffs, the best evidence of their authority to Robertson, the actual plaintiff, would be their own testimony. When I stated that either transporting them to San Francisco or taking their depositions would be a very difficult, expensive and elaborate affair. I told him that I had written evidence of these men's authority and that their signatures were on these authorizations, and if the defendant had any doubt, they have, of course, payroll records and other evidence of these plaintiffs' signatures; they could compare those signatures and indicate any which they felt were dubious. Mr. Colby stated that he knew of only two instances in which there was any doubt as to these authorizations.

Mr. Colby: Among the existing plaintiffs.

Mr. Edises: Among the existing plaintiffs, and I told him in that case we would submit it to their judgment, that [147] is to say, let them take the signatures on the authorizations, compare them, and indicate whether they are satisfied as to their genuineness. With that understanding in mind, which I thought was clear, we made no effort to request

that these authorizations be checked by deposition or to bring these people down here from the Territory of Alaska. I simply wanted to remind counsel of that, because obviously it would put me in an extremely embarrassing position if at this stage I were obliged to prove those authorizations in any other manner than I have just indicated.

Mr. Colby: I might state that I am rather interested in counsel's statement. I gave no intimation that we would admit anything of this sort. We have been very kind to counsel on the opposite side. We have produced the copies of records that they wanted in order to show which parties were employed and the time of employment, so that they could check off all the plaintiffs that were before the court in this case. We went to considerable expense to do that, saved them a trip to Alaska, or taking depositions there, and going to very considerable expense. But this idea of admitting that those people are represented by Mr. Robertson I could not think of for a moment, in view, particularly, of the fact that we have found in the case of one, at least, of these plaintiffs—we have not interviewed or attempted to interview any of the others—but this information came to us: when this plaintiff [148] found out an action had been filed here, he stated he had not authorized it and did not intend to authorize it. And then, as I say, there are other instances. We have found some of them have not even worked for the company during this period of time, haven't even been employed for over six years past. So you can see that this is sort of

a dragnet brought in here by these people. That is one of the points I raised. Here he is going to rely on a wire. How do we know where it comes from? I am advised by Mr. Faulkner, here, local counsel in Alaska, that one of those persons in the wire there is probably across the ocean somewhere. So we certainly are going to deny that Mr. Robertson has any authority to represent anyone but himself and compel the other side to produce the proof.

Mr. Edises: Well, your Honor, I must confess——

Mr. Colby: Oh, yes. I want to add to that that counsel made the statement to me such a short time ago—about a week ago—it was absolutely impossible for him to take depositions. This case has been pending in this court for two years, and yet they have not attempted to take any depositions, or even brought this matter up until about a week ago. Our records are in Alaska. He talks about comparing them with the records. Our records are in Alaska. We can't compare signatures or anything of that sort.

Mr. Edises: Your Honor, I have no desire to indicate that counsel has deliberately misled me, but I must say sincerely [149] that the position he is now taking is directly contrary to the understanding which he gave me over the telephone. I have my notes which I made on that very day, and my very first sentence is, "Written authority is satisfactory. Two men deny authorizations. Two signatures can be checked."

And then we discussed the fact that the issues

would be primarily legal issues, that there would be very few factual questions. Mr. Colby, according to my notes, stated they intended to introduce proof of understanding with union re basis of payment, but this still leaves open the question of the legal effect of such understanding and they are preparing summaries of commerce data.

Mr. Colby: What day was that on?

Mr. Edises: That was January 3, 1945.

Mr. Colby: As I stated to your Honor, what opportunity had he to take depositions between January 3rd and the time of trial?

Mr. Edises: That is not the point, Mr. Colby. If you had intended to put me to my proof, the honorable thing to have done was to tell me about it.

Mr. Colby: I did tell you about that.

Mr. Edises: I deny that, sir.

Mr. Colby: I tell you the information I gave you was the exact opposite.

Mr. Edises: Under the circumstances, your Honor, it [150] should be obvious that if Mr. Colby had told me that I would be put to my proof on that question, and that he would not grant at least a prima facie character to the written authorizations, I should immediately have undertaken to obtain deposition. I did not do that, nor did I request a continuance of the trial date, which might have been done at that time, because I relied on the assurance that Mr. Colby gave me.

Mr. Colby: It was a misunderstanding and I never gave you such an assurance.

The Court: Well, there is certainly a misun-

derstanding between counsel upon this point. What do you wish to do about it? What suggestion have you to make to the Court about it? This conversation you say took place in January of this year. If the denial was made at that time, as Mr. Colby says he made it, and he makes it now, why, of course, you would not have had time to take depositions, and you would have had to apply to the Court for a continuance.

Mr. Edises: Yes, your Honor, that is correct, and I should have made such a motion. It would have been inconceivable to me, as a matter of fact, that on an issue of this kind, which can be so easily checked by counsel, that it would have been necessary for us to do that. But it is true I should have made a motion for a continuance. Under the circumstances it may be—I am not at all sure—but that authorizations of that kind would bear by virtue of their mere presentation a [151] prima facie or presumptive character. It is pretty much like the contention in any lawsuit——

The Court: The plaintiff is here.

Mr. Edises: Mr. Robertson is here.

The Court: Yes. Is he not able to testify to that?

Mr. Edises: No, your Honor, because those authorizations were mailed directly to our office, to our firm.

Mr. Colby: Your Honor, as the matter becomes refreshed in my mind, I stated to counsel here that possibly some of our witnesses that came down might be able to identify those signatures and tes-

tify that they were accurate, but if they were not, I would not admit it.

Mr. Edises: I do not recall that statement.

Mr. Colby: That was made.

The Court: Maybe that is so.

Mr. Colby: I immediately went in and told my associate. My associate corroborates me on that.

The Court: If those witnesses are here and they can give such testimony, perhaps we had better proceed. If you wish, I will listen to an application for a continuance.

Mr. Edises: I suggest——

The Court: If it is possible to proceed, I think we ought to do it.

Mr. Edises: I will present these authorizations to counsel, and if they are able to identify them, very well; otherwise, [152] I will make a motion for a continuance.

The Court: Very well.

Mr. Colby: I do not know why counsel should wait for a year and a half before taking this matter up.

The Court: Well, I do not, either, Mr. Colby.

Mr. Colby: We have tried to do everything we could for them.

The Court: There is a situation here which we are trying to meet. Let us meet it if we can.

Mr. Edises: May I simply say this, your Honor, by way of personal offense, that I came into this case not more than perhaps a month or six weeks ago.

The Court: If you wish now we will have a re-

cess for a few minutes. These gentlemen who are here from Alaska may look at these documents, and the signatures, and then advise us whether or not they are able to accede to the request of counsel. Five minutes recess.

(Recess.)

Mr. Colby: If it please your Honor, the witnesses who were brought down from Alaska have examined these and they recognize some of these signatures. One of the witnesses recognizes some and the other others. So we will not make any objection to the genuineness of the signatures. I might state in this connection that I asked Miss Livingstone to provide me with this proof, because of the question that had arisen as to whether [153] some of these people had authorized this action, and I wanted to know the nature of the authorization, and it was never furnished.

The Court: Yes.

Mr. Colby: That was a year and a half ago.

The Court: Mr. Edises, can you add anything to what you have stated in that regard?

Mr. Edises: Do you indicate, Mr. Colby——

The Court: As I understand it, you are not going to make any objection——

Mr. Colby: There are one or two signatures they do not recognize, but in view of the fact they recognize most of them, we are not going to make any objection to any of them, so far as the signatures are concerned.

The Court: You may proceed.

Mr. Edises: We will offer in evidence, your

Honor, a series of seventeen authorizations to E. E. Robertson, the plaintiff.

The Court: They may be admitted.

Mr. Colby: We will enter an objection to that, merely to keep the record straight. Certain of those parties do not appear to have any claim against the company.

The Court: Objection overruled.

(The documents in question were thereupon received and marked Plaintiff's Exhibit 1.)

The Court: Now, as to these statements that were produced by Mr. Colby—he presented to you certain statements——

Mr. Edises: Yes, your Honor. I have examined the statements which Mr. Colby very kindly furnished, and they appear to be satisfactory. I do not have any desire personally to check these statements against the company's records. I accept them as accurate and authentic, and I should like to offer them as Plaintiff's Exhibit next in order.

The Court: How do you wish them marked now? Separately?

Mr. Edises: I think they should be given a number and a letter for each—1-A, -B, -C. Will you mark them for identification, and then I will offer them.

The Court: If there is no objection, Counsel, why don't you offer them in evidence?

Mr. Edises: Very well.

The Court: Let them be admitted in evidence at this time and given the proper mark.

(The documents in question were thereupon marked Government's Exhibit 2.)

Mr. Colby: I would like to make a statement at this time in connection with this subpena to produce records, that there are two separate classes of records called for: First, books and records relating to ore and the proceeds, which are the records which we have summarized and which are embraced in this Exhibit 2-A, -B, -C. [155]

The Court: As to that, now, you have said you have here the original records.

Mr. Colby: I have the orginal records, but we have complied fully——

The Court: So if counsel wishes to compare them with this document you have produced he may do so.

Mr. Colby: Now I am speaking of the second demand for books and records showing hours worked and wages received by the plaintiffs in the above-entitled action, and each of them, while in the employ of the defendant, from April 23, 1940, to April 30, 1941, and I explained to Mr. Edises over the telephone when he called my attention to this that when it had been served on our company, my understanding with Miss Livingstone was after we had produced——

The Court: Who is Miss Livingstone?

Mr. Edises: She was the young lady who had originally handled this case, your Honor.

Mr. Colby: She represented these plaintiffs at the time of that argument we had on the preliminary motion.

The Court: She is an attorney?

Mr. Colby: Yes. I stated to her at that time in answer to her request, in order to save the expense of going to Alaska and taking depositions there by someone in Alaska, that we would furnish complete copies of the payrolls and the sheets that we had up there at the mine covering the hours and wages, and [156] therefore I told Mr. Edises that since this subpena was served rather late, that it would be practically impossible to bring these books down at this time, and that it was contrary to the understanding that I had had with Miss Livingstone that if we furnished those copies, we would not be required to produce the books.

Mr. Edises: That is quite satisfactory. As I told Mr. Colby, the copies are agreeable and we have no desire to check the original records.

The Court: Very well. All these statements have been offered, have they?

Mr. Edises: Correct. At this time I should like to offer as Plaintiff's Exhibit next in order the copies of the records of time worked and earnings during the period covered by the complaint.

The Court: Any further explanation? What is that? Where did you get it?

Mr. Edises: This is the document referred to by counsel in his statement a moment ago. We accept them as accurate and authentic extracts or copies of the original payroll records setting forth this data.

The Court: They may be admitted.

(The documents in question were received in evidence and marked Plaintiff's Exhibit 3.)

The Court: Are the pages of that exhibit fastened together? [157]

Mr. Edises: They are not fastened together, your Honor.

The Clerk: Put together by bands, your Honor, loose sheets.

Mr. Colby: I think it would be advisable to punch holes in them and put them together with a metal clip.

The Court: I was wondering if you could not do that.

The Clerk: I will bind them, your Honor.

The Court: They will be bound as one exhibit.

Mr. Colby: And lettered consecutively?

The Court: Do you wish every page lettered separately?

Mr. Colby: Each separate individual page, so we can refer to the records that apply to a certain plaintiff.

The Court: It is made out as to each individual?

Mr. Edises: Yes.

The Court: That is a good suggestion.

Mr. Edises: Your Honor, I offer as Plaintiff's Exhibit next in order interpretative bulletin No. 4, entitled, "Maximum hours and overtime compensation, November, 1940," an official publication of the United States Department of Labor, Wages and Hours Division, and counsel, I take it, has no objection to the offer.

Mr. Colby: Not in particular.

(The document was thereupon received in evidence and marked Plaintiff's Exhibit 4.)

Mr. Edises: At this time, your Honor, if counsel feels the desire for some additional corroboration of the authenticity [158] of the signatures of the various plaintiffs——

The Court: It seems to me, Mr. Colby, as suggested by Mr. Edises, you ought to be able to determine that without much difficulty.

Mr. Colby: We have accepted those, so there is no controversy over that.

Mr. Edises: I was simply going to state, your Honor, on the basis of business correspondence, letters, I could myself, if necessary, identify those signatures.

The Court: You have heard the stipulation of Mr. Colby and that ends it.

Mr. Edises: Very well. Thank you. Call E. E. Robertson.

E. E. ROBERTSON,

called as a witness on behalf of plaintiffs; sworn

Direct Examination

Mr. Edises: Q. Your name is E. E. Robertson?

A. It is.

Q. And you are the plaintiff in this action?

A. I am.

Q. You have brought this suit as representative

(Testimony of E. E. Robertson.)

of and on behalf of the persons named in paragraph 3 of the complaint?

A. I am; I did.

Q. In the caption? A. I did.

Q. And also on behalf of all other persons similarly situated, as provided in the Fair Labor Standards Act? A. Yes.

Mr. Edises: That is all, your Honor. [159]

Cross-Examination

Mr. Colby: Q. Mr. Robertson, you were employed by the Alaska Juneau Company, I believe?

A. Yes.

Q. In what capacity? A. Nightwatchman.

Q. How long were you employed?

A. In that job from January 8, 1936 up to and including the 12th of August, 1942, with the exception—well, I was employed overtime—I worked every night with the exception of July 17th, 18th, 19th, and 20th, 1942.

Q. And when did your employment terminate?

A. The 13th of August, 1942.

Q. Under what circumstances?

A. I was fired.

Q. What was the reason?

A. It was over——

Mr. Edises: Your Honor, may I object to that on the ground it is incompetent, irrelevant, not within any of the issues of the case?

The Court: I am wondering how it can be material.

(Testimony of E. E. Robertson.)

Mr. Colby: It has a bearing on the weight of the witness' testimony.

The Court: Overruled.

Mr. Edises: Exception.

Mr. Colby: Q. At the time that you were discharged did you make a threat to the superintendent, Mr. Williams, that you were going to bring a suit? A. I did not.

Q. You did not at that time?

A. I did not.

Q. Had you made any demand on the company at that time for back [160] pay?

A. I asked Mr. Williams, when I was given my time, if that back pay was included in it.

Q. In other words, that time was the first time you made a demand for the back pay?

A. I made no demand then. I asked him if it was included in my check.

Q. In regard to these people that you represent, do you know Sam Dapcevich——

Mr. Edises: Your Honor, I object to that as irrelevant, on the ground that if he has been authorized by these persons it is immaterial whether he knows them or does not know them.

The Court: Overruled.

Mr. Edises: We will stipulate, your Honor——

The Court: No, overruled. Answer the question.

A. I don't know the man by name.

Mr. Colby: Q. Do you know Marko Dapcevich?

A. I don't know the man by the name.

(Testimony of E. E. Robertson.)

Q. Do you know whether he is alive, or not?

A. I do not.

Q. And did you, after you were discharged, go to the union that was the bargaining agency representing the company and try to get them to back up this litigation?

A. I told them of my intentions.

The Court: What was that?

A. I told them of my intentions of trying to.

The Court: Read the question. Listen to the question and answer the question as best you can. If you wish to explain [161] your answer then you may do so.

A. I did not. I withdrew from the Union at that time.

The Court: Q. What is that?

A. I withdrew from the union.

Mr. Colby: Q. And you did not ask any of the union people to join you in this litigation?

A. Not at the union, sir.

Q. Not at the union. Now, from April 23, 1940, up to May 1st of that same year, what was your salary?

Mr. Edises: Your honor, I object to this line of questioning on the ground it is outside the scope of the direct examination.

The Court: Overruled. I had that very question in mind to ask him. I was going to ask him what pay he received.

Mr. Colby: It will go directly to the substance of the action.

(Testimony of E. E. Robertson.)

The Court: Overruled.

A. I received different wages there. One figure was $4.85 a shift, another was $5.10 a shift, and $5.25 a shift, and then a different figure from that that I don't remember.

Q. What is a shift?

A. 8 and 9 hours I put in.

Mr. Colby: Q. During that period I mentioned prior to May 1, 1940, how was your pay calculated? On a weekly basis or on a daily basis?

A. Nothing—I never was able to ascertain.

Q. You could not——

A. I was never able to get the information. I never knew.

Q. You did not know anything about what your wages were, so [162] far as the calculation was concerned?

A. I only knew what I received on my pay check, and I knew sometimes what was short.

The Court: Q. Just a minute. What was that that you said?

A. I knew from one pay check to another if I was short—I checked my records, my pay checks, your Honor—I knew if I was short. I would sign my checks under protest if they were short.

Q. Were they short?

A. Sometimes they were.

Mr. Colby: Q. Were they ever over?

A. Not to my knowledge.

The Court: Q. How were you paid? Weekly or monthly?

(Testimony of E. E. Robertson.)

A. Twice a month, the 10th and the 25th of the month, your Honor.

Mr. Colby: Q. During that period were you paid for overtime? A. Not to my knowledge.

Q. You were not? A. No.

Q. Have you examined the records here of your pay?

A. I examined my—my pay check shows, the number of the pay checks—I have a record of them—there is never any more after the Wage and Hour law went in—in fact, one pay check was less.

Q. That was not the question. The question was, have you examined this record that has been put in here of your employment? A. No.

Q. You have not? A. No.

Q. I will ask you to examine that at noon time so that you can answer these questions intelligently after noon, and let me know whether you received any overtime during that period.

Mr. Edises: Your Honor, I will object to that question, [163] because it is asking the witness to answer the very fact in issue here.

The Court: Objection sustained.

Mr. Colby: May I make a statement in that regard?

The Court: Yes, if you wish.

Mr. Colby: I am not asking him——

The Court: I do not know why he should examine any records and give his opinion or conclusion that he received any overtime. Now, you say, so far as you know you received no overtime?

(Testimony of E. E. Robertson.)

The Witness: I received none so far as I was able to ascertain from my personal records—pay check data I kept for my information, your Honor. There was never any more after the overtime went in.

The Court: Q. What do you mean by saying there was never any more after the overtime went in?

A. When the Wages and Hours law took effect, there never was any more, and the first pay check after the Wages and Hours law became effective, it was some two or three dollars less than I had been receiving.

Q. When do you say the Wages and Hours law went into effect?

A. I have forgotten the year—1938 or 1939—I don't remember the year.

Mr. Colby: It was October of 1938.

The Witness: Well, as I remember it, it went in on the 25th of the month, on a Monday—it would be the 24th of the month. [164]

Mr. Colby: It was October 24th, 1938.

The Witness: I believe that is right.

The Court: Q. You say you never received any overtime?

A. I received no more—my pay checks were no more, your Honor, after that date counsel stated than I had been receiving before.

Q. You received pay at the same rate?

A. Yes.

Mr. Colby: Q. As a matter of fact, you received

(Testimony of E. E. Robertson.)

overtime even before this Act went into effect, didn't you?

A. I don't know of any overtime.

Q. You do not know anything about the Alaska law on the subject?

Mr. Edises: Now, I object to that, your Honor.

The Court: Objection sustained.

Mr. Colby: Here we are——

The Court: Objection sustained. Proceed. He said he doesn't know.

Mr. Colby: Q. I will ask you then, Mr. Robertson, to get at it another way, whether there was a material difference between the wages that you received prior to May 1st——

The Court: 1938?

Mr. Colby: 1940.

The Court: Why 1940?

Mr. Colby: Because the statute of limitations had run to everything prior to April 23, 1940.

The Court: All right.

Mr. Colby: Q. (Continuing): ——and whether there was any [165] difference in the amount of wages that you received immediately prior to May 1, 1940, and the wages that you received after May 1, 1940?

A. If there was any difference in the wages, they were by reason of negotiation between the local C.I.O., Local No. 2——

The Court: No.

The Witness: The bargaining agency——

The Court: Just listen to the question and an-

(Testimony of E. E. Robertson.)

swer it as directly as you can, and then if you wish to explain your answer you may do so. Listen to the question.

(Question read.)

The Witness: There was a difference in there.

Mr. Colby: Q. Which way?

A. Well, early in like 1936, 1937 and 1938 there was smaller wages——

Q. No, I am talking about these two periods.

A. I can't remember the dates that they took effect, but when they were different, it was caused by negotiation of the union with the company, bargaining agency, a blanket raise.

The Court: Q. Just one minute. What?

A. A blanket raise that the union negotiated with the company.

Mr. Colby: Q. And that resulted usually in a raise of wages? A. Yes.

Mr. Edises: Your Honor, I think that it is clear, this objection, that the best evidence of the wage raise this man received would be the records of the company. [166]

The Court: That is correct, but I think the question is proper. Overruled. Go ahead.

Mr. Colby: Q. Did you ever attend any union meetings when these matters were discussed?

A. Oh, yes.

Q. In connection with the raising of wages or change? A. Yes.

Q. You did. Did you attend any conferences

(Testimony of E. E. Robertson.)

when Mr. Metzger was there? Do you know Mr. Metzger?

A. Yes, I remember Louis Metzger, yes, sir.

Q. He was the general superintendent?

A. The general superintendent, yes.

Q. Did you attend any meetings where he was present and where these matters were discussed?

A. Not this wage issue.

Q. You received an extra payment, did you not, at one time along in 1941?

Mr. Edises: I will object to that question on the ground of its indefiniteness, on the ground that it calls for the conclusion of the witness.

The Court: Overruled. If he knows.

Q. Do you know what Mr. Colby is talking about? A. Yes, I do.

Q. Tell us about it.

A. After a decision had been handed down, as I understand it, in the courts of San Francisco, the Wage and Hour Law Administrators, or attorneys, whichever it goes through, they authorized the company to pay from the 14th of December up to and including the 30th of April, the following April—now, I don't know the year—if you say it was 1941, [167] that is probably correct, sir. I did receive about $112, something like that.

Mr. Colby: Q. Did you read this complaint before it was filed, this amended complaint?

A. I saw this amended complaint there.

Q. Before it was filed?

(Testimony of E. E. Robertson.)

A. I saw it yesterday, if that is what you have reference to.

Q. No, I mean at the time it was filed originally.

A. No.

Q. You did not take any part in its preparation?

A. I engaged the attorneys to look after the business.

Q. Yes. What I mean is, in the direct preparation of the complaint with reference to the allegation as to the amount that was due you.

A. I never saw it.

Q. You say you have seen the complaint?

A. I saw the amendment that was introduced with these signatures yesterday that was introduced this morning. That came a couple of days ago.

Mr. Edises: He is referring to the motion.

The Court: No.

The Witness: I haven't seen the original complaint as filed by my attorneys.

Mr. Colby: I am not referring to the original. I am referring to the amended one, which contains a statement of the amount that is due you, and I was going to ask you whether that amount was correct, as stated in the complaint.

The Witness: I have never seen it, sir. [168]

Mr. Colby: Will you admit, Mr. Edises, that it does not take into consideration the payment made under the order of the court?

Mr. Edises: The allegations of the complaint

(Testimony of E. E. Robertson.)

as to wages received and payable were based upon payroll records, and not on any information furnished us by this witness. I believe it is true that the complaint does not refer to a certain sum of money by way of back overtime which was paid to this plaintiff and some of the other plaintiffs following the consent decree which was issued by this court a year or so ago. But I will say further, I believe we are prepared to stipulate that to the extent that that payment does represent overtime, back overtime actually paid, you may have a credit for that.

We have no desire, of course, to obtain it twice over.

Mr. Colby: We were a little surprised when we got this complaint to find that the claim was for the entire amount that they alleged to be due and had no credit for the amounts paid under the order of this court, and in spite of the fact that on the pay sheets that were furnished them, those specific amounts were set forth. In other words, they have the amounts that pleased them and left out the amounts——

Mr. Edises: We must object to that characterization. We did not take the amounts that pleased us, and I assure the court we have at all times attempted to deal very openly. The fact of the matter is there are some difficult and interesting [169] legal questions about this matter of calculation, and we wanted the entire matter to come before the Court. Counsel has, of course, every op-

(Testimony of E. E. Robertson.)

portunity to establish the payment by way of defense, which they have.

Mr. Colby: The point is this: Here is a complaint signed by the parties. They have full knowledge of the payment.

The Court: You are arguing the matter now, Mr. Colby.

Mr. Colby: Q. I infer from that, then, you do not know anything about any payments that have been made by the company under the order of this court in that particular litigation to any of the plaintiffs?

A. I only know about my own.

Q. You do not even know that, do you, so far as the complaint is concerned?

Mr. Edises: I object to that as argumentative, your Honor.

The Court: Overruled.

A. I only know of the overtime I received with one check, about $112. I believe that was in July, probably, 1942.

Mr. Colby: Q. As I understand it, you do not know whether the amount that is asked for for you in the complaint includes that, or not, includes that payment to you?

A. No, I have no way of knowing.

Q. The same would be true of the other plaintiffs? A. I don't believe it is.

Q. You don't believe it is?

A. I don't believe it is so.

(Testimony of E. E. Robertson.)

Q. Then do you not believe your attorney's statement here? [170]

The Court: Well, I suppose the records, themselves, would show.

The Witness: I don't think my attorney's intention is to collect twice.

Mr. Colby: Well, there it is. I do this, your Honor, because the authorities are very positive that the parties who sue must show what payments are made to them. The burden is on them to show and not on the defendant. That is the statement that is made in the authorities. If they have received any payments on account of the claims, they must prove them.

Mr. Edises: It has been proven, your Honor, by the payroll records which are in evidence now, and they are the best evidence of all these matters that counsel has been questioning this witness about.

Mr. Colby: Then this question is foreclosed by your admission that the payrolls are correct in that respect?

Mr. Edises: I thought I said that before.

Mr. Colby: The only thing that surprises me is that in your complaint you ask for the full amount and we, of course, have to assume that you are going to prove the full amount.

Mr. Edises: I regret that counsel has been surprised.

Mr. Colby: We furnished you with the information, and you accept the information as to part of it, but when it comes to these payments under order

(Testimony of E. E. Robertson.)

of court, they make no accounting for it. It does not appear in the complaint. [171]

The Court: Counsel says that is all cleared up now. The evidence has been offered.

Mr. Colby: It is all right if it is.

The Court: You may proceed.

Mr. Colby: Q. Do you know anything about this split day plan?

Mr. Edises: I object to that.

Mr. Colby: I am speaking of the term as it was applied here by the company to its employees in payment of wages, and so on.

Mr. Edises: I object to that as vague, indefinite, unintelligible, calling for the witness' opinion and conclusion on a matter of law.

Mr. Colby: I am just asking if he knows.

The Court: If you know anything about it.

Mr. Colby: Q. Do you know anything about it?

A. Only common knowledge on it.

Q. Do you know when the split day plan was put into effect up there?

A. I recall the time that it was done, but not the date.

Q. Did it make any difference to you in the amount of wages you received when that plan was put into effect? A. Not that I recall.

The Court: That, too, would all be taken care of by this evidence of the payroll, wouldn't it? [172]

Mr. Colby: No, this is the legal proposition, This goes into the legal phase of it.

The Court: I see.

(Testimony of E. E. Robertson.)

Mr. Colby: Q. Do you know, Mr. Robertson, or did you attend a meeting where the union discussed this split day plan, and do you know whether or not they favored its adoption?

Mr. Edises: Objected to as incompetent, immaterial, and irrelevant.

The Court: Read that question, Mr. Reporter.

(Question read.)

The Court: Overruled.

Mr. Edises: Exception.

The Witness: Am I to answer?

The Court: Overruled. Yes, answer.

A. I attended every regular meeting that I could during the time that they had a union, from the time I became a member, and that was the discussions in the union hall of their business, our hours, or our wages, the grievances. I don't know any particular date that we discussed this question.

Mr. Colby: Q. Don't you know, then, that the union requested the company over the objection of the company to put in effect this split day plan?

Mr. Edises: Your Honor, may I have an objection to this entire line of questioning?

The Court: Yes, overruled. [173]

A. It happened before I knew about it.

Mr. Colby: Q. That does not answer the question. Did you know by any means afterwards or before that the union had requested the company to put this split day plan into operation?

A. I heard it discussed probably many times, but it was—the request was made before I knew

(Testimony of E. E. Robertson.)

it was made. It was made and done before I knew about it.

Q. Did you know that the union made the request?

Mr. Edises: I object to that, your Honor, on the ground that there is no foundation to show——

The Court: Overruled.

A. I didn't know until the day after it had been made and granted.

Mr. Colby: Q. Yes, but then you knew that the union had made the request?

A. I knew the day after the demand was made upon the late Louis Metzger, the general superintendent—whatever it was made of him. I don't know what the request was.

The Court: Q. You knew there was a demand made?

A. Yes.

Q. That was after——

A. A day after I knew about it.

Q. After the action had been taken?

A. Yes.

Q. Whatever action was taken?

A. Whatever it was, yes.

Mr. Colby: That is all.

Mr. Edises: I move to strike the testimony of this witness as to the question of the unions favoring or requesting the so-called split day plan, on the ground it has no legal [174] relevancy to the issues of the case.

(Testimony of E. E. Robertson.)

The Court: Denied. Is that all with this witness?

Mr. Edises: I have a question, your Honor.

Redirect Examination

Mr. Edises: Q. Mr. Robertson, with respect to this $112 that you received, you were simply given a check and accepted it, is that right?

A. Yes.

Q. That did not result from any personal negotiations between you and the company, did it?

A. No.

Q. Nor, so far as you know, did it result from any negotiations between the union and the company, is that correct? A. No.

Mr. Edises: That is all.

Recross Examination

Mr. Colby: Q. Do you recall whether or not you signed the payroll when you got this amount, or gave any receipt?

A. I signed for the check.

Mr. Colby: That is all.

Mr. Edises: No further questions, your Honor.

The Court: That is all.

Mr. Edises: The plaintiff rests.

Mr. Colby: If your Honor please, I move for a judgment for the defendant, in view of the fact that there has been no showing made here as to the exact nature of the work performed by the plaintiffs, or any of them. Even though it be ad-

mitted that the company is engaged in interstate commerce, and would be [175] affected by this act, it has not been shown that the parties were engaged in activities which were not intra-territorial. In other words, if they are engaged in any of their employment in an operation which is entirely intra-territorial, then they do not come within the purview of the act. So the proof is insufficient in that regard.

The Court: I will reserve my ruling on your motion.

Mr. Edises: Would your Honor care to hear from me?

The Court: Not now. Do you wish to offer any evidence, Mr. Colby?

Mr. Colby: Yes, we have quite a little evidence. I will call Mr. Faulkner to the stand.

H. L. FAULKNER,

called as a witness on behalf of defendants; sworn.

The Clerk: Q. What is your full name, Mr. Faulkner?

A. H. L. Faulkner.

Direct Examination

Mr. Colby: Q. Mr. Faulkner, where do you reside? A. Juneau, Alaska.

Q. What is your business or profession?

A. Attorney-at-law.

Q. How long have you practiced law?

A. Since August, 1914.

(Testimony of H. L. Faulkner.)

Q. Have you practiced law in California?

A. No, I am a member of the bar here, accepted before the Circuit Court of Appeals.

Q. When did you first start practicing law?

A. When did I what? [176]

Q. When were you admitted to practice.

A. August, 1914.

Q. Previous to that what was your occupation?

A. For a little over four years I was United States Marshal.

Q. Where was that?

A. In Alaska. Previous to that I was chief deputy marshal.

Q. Do you know the defendant company here, know of it, the Alaska Juneau Gold Mining Company? A. I do.

Q. What has been your relation to that company?

A. Well, since 1937 I have been attorney for the company in some matters.

Q. In order to bring that to a point, you represented them in labor matters, did you not?

A. Yes.

Q. In the preparation of agreements with the union up there? A. Yes.

Q. And the men? A. Yes.

Q. You are familiar, are you not, with this Labor Standards Act that we have under consideration here? A. Yes, sir.

Q. Did the company ever consult you in that connection? A. Yes, many times.

Q. What did you do when you found that this

(Testimony of H. L. Faulkner.)

act was passed and was going into effect in that connection, in order to familiarize yourself with its workings, and so on?

A. When the act was passed I was in England, and I came home in September before it went into effect. In the meantime the company's superintendent had consulted some other attorneys in San Francisco and Seattle regarding the law. And then I discussed [177] it with them after I returned home.

Q. Did you have any occasion to go east at any time to confer with the authorities there as to the nature of this act and its operation? A. I did.

Q. Just state briefly to the court in your own way what you did in that respect.

Mr. Edises: Objection on the ground that what he did in that regard is irrelevant to any of the issues, the proper issues in this case.

The Court: Sustained.

Mr. Colby: If your Honor please, the reason for this is we are claiming an estoppel by reason of the fact that this witness was advised by Mr. Andrews, who was then the Administrator of the Wage and Hour Division, who had charge of administering this act, as to its operation, and the courts have held that the opinion and the rulings of this administrator are highly persuasive.

The Court: Yes, they are persuasive.

Mr. Colby: They are not controlling. And also for the further reason that this gives us a background, and we are urging in this case that we have acted in good faith. It shows our good faith, and

(Testimony of H. L. Faulkner.)

good faith, the courts say, is a very large element in the determination of these matters, showing that the company has tried to conform to the law. There are many cases holding that. [178]

The Court: You say the question arises here on a matter of estoppel?

Mr. Colby: It is in the nature of an estoppel.

The Court: I do not know that it would be very helpful to the Court.

Mr. Colby: It is testimony that will not take very long, and it will be right to the point. I might state it in substance.

The Court: Somebody who is in an official position in Washington at the time gave some opinion about something.

Mr. Colby: I can cite your Honor two decisions of the Supreme Court of the United States in which they cite these opinions and give great weight to them.

The Court: It depends on the circumstances. I understand. The administrators' interpretations and all that sort of thing I have had many times before me.

Mr. Colby: If your Honor please, we are not contending that this opinion of the administrator is binding, but we want to show that the company acted in entire good faith in going at this matter, tried to get at the bottom of it, and it would have a great deal to do with damages or penalties or whatever it might be.

(Testimony of H. L. Faulkner.)

The Court: All right. Let the ruling be set aside. You may answer the question.

Mr. Edises: Exception.

The Court: Q. You went to Washington and received the [179] opinion of somebody about the operation of this new act.

Mr. Colby: Q. State briefly what it was.

A. Yes, sir. I went to Washington for an association of miners to assist in getting an amendment to the Fair Labor Standards Act, which was sponsored by the administrator and by the committee on labor. While there I attended a conference held between the administrator, Mr. Andrews, and nineteen congressmen and two or three other men at which an interpretation——

Q. Were there any mining men there?

A. Yes, four or five, besides the congressmen from the mining states—nine of them from the western mining states—and about five mining men, including some men from Nevada, Arizona——

Q. There is no need of going into these details. What did the administrator state at that meeting in answer to a question by some person there, as to whether the split day plan was authorized by the act, or not?

Mr. Edises: Your Honor, may it be understood my objection runs to this entire line of questioning?

The Court: Yes, it goes to all of it.

A. The administrator said that such a plan was legal and authorized.

(Testimony of H. L. Faulkner.)

Mr. Colby: Q. Was that given any publicity after that?

A. Yes.

Q. What was that?

A. The American Mining Congress put out a bulletin which was very widely circulated all over the United [180] States and Alaska, containing the results of this interview.

Mr. Colby: We would like to offer a copy of this bulletin as an exhibit.

The Court: I do not think this is at all material. It is not impressive at all.

Mr. Edises: Your Honor, may I state——

The Court: It is not impressive at all, Mr. Colby. I do not see how it is going to be helpful to the Court at all in this matter.

Mr. Colby: As I say, your Honor, I can cite you authorities holding——

The Court: I know what the authorities are, Mr. Colby. We have considered them many times. I may be in error in this, but the way it appears to me, it is not going to be at all helpful in deciding these questions.

Mr. Colby: I will state for the record, if I may, that we propose to show——

The Court: There was a conference in Washington as between some congressmen and somebody who was connected with the administration of this act. Something was said by somebody, and it was published in the newspaper or some journal. Is that what it amounts to?

(Testimony of H. L. Faulkner.)

Mr. Colby: It was published by the American Mining Congress.

The Court: How helpful can that be to the Court in this [181] matter? I can't see that, at all. I take it the mine owners are acting in the utmost good faith. Do you question that, counsel?

Mr. Edises: I think it is irrelevant, your Honor, immaterial under the decisions.

The Court: They are doing the best they can, I take it, under the circumstances. This was a new law, was it?

The Witness: Yes, it was a new law.

The Court: Q. You were interested in finding out all about it?

A. Yes, sir.

Q. It was a matter that could come to your notice, of course; you are an attorney in Alaska, the mining district there; your clients were miners. I understand all that. You wanted to find out all about it. You wanted to find out the attitude of Washington concerning its administration and its enforcement. That is what it really amounted to.

A. Interpretation.

Q. Yes, interpretation and administration. You went there and you got all the information you could on the subject; that is it, isn't it?

A. We did the best we could. We were anxious not to violate the law and tried to comply with the interpretations which were afterwards changed.

Q. Have the opinions that were given to you at the conference been changed since?

(Testimony of H. L. Faulkner.)

A. Oh, yes.

The Court: Well, there you are—a man who happened to [182] be in an official position at that time stated in his opinion what the law would be and what he thought the Government would do.

Mr. Colby: We do not contend, if your Honor please, that this is controlling, but merely it shows the company's good faith, and why it did these things which it subsequently did. That is the point, and the critical point is that this administrator stated publicly, and it was widespread, that this split day plan, as they call it, or the Poxon plan, was entirely within the act and it was lawful. That was the point.

It is close to adjournment.

The Court: Yes, we will have a recess now until two o'clock. You were going to offer some document or publication.

Mr. Edises: Your Honor, I think in view of the fact that testimony has been permitted over our objection, we ought to have this memorandum.

The Court: What memorandum?

Mr. Edises: That he referred to.

Mr. Colby: We will not introduce it now. The substance of it is in the wide publicity.

The Court: What memorandum are you talking about?

Mr. Edises: He stated that the results of this conference with the administrator was published in a bulletin by the American Mining Congress. They are relying on that bulletin. We feel inasmuch

(Testimony of H. L. Faulkner.)

as this matter has been gone into over our objection, we ought to be able to see the actual written memorandum [183] of this conference. I will state, your Honor, my purpose in requesting it is this: It is directly contrary to our understanding that Administrator Andrews ever authorized any public statement or made any public opinion on this point, at all. We understand that this memorandum will confirm our position in that regard.

The Witness: Your Honor, I did not say that Andrews authorized anything. I said the Mining Congress published the bulletin and distributed it.

The Court: The Mining Congress?

A. Yes.

The Court: If you wish to offer it, I see no objection to it going in.

Mr. Edises: It will be subject to our general objection.

The Court: I do not know. You want it in one second—Now, listen: I have indicated my thought upon the matter. I do not think it is going to be very helpful. I think we are taking up time that could be devoted to other things.

(The document in question was received in evidence and marked Defendant's Exhibit A.)

The Court: We will be in recess until two o'clock.

(A recess was thereupon taken until 2:00 o'clock p. m.) [184]

Afternoon Session,

January 12, 1945, 2:00 p. m.

The Clerk: Robertson v. Alaska Juneau Gold Mining Company, on trial.

Mr. Colby: Ready. If your Honor please, just for the sake of the record, I am handing the clerk the affidavit of J. A. Williams, that I mentioned this morning in connection with my argument on the motion of the plaintiffs.

The Court: Very well.

Mr. Colby: And my own reply I had with me, so it is being written up this afternoon. I will file that just as soon as I can verify it.

The Court: Yes.

H. L. FAULKNER,

recalled.

Direct Examination—(Resumed)

Mr. Colby: Q. Mr. Faulkner, what, if anything, did you do in the way of advising the company just prior to the time that this new wage scale went into effect, October 24, 1938?

Mr. Edises: To which I will object on the ground it is incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

Mr. Colby: If your Honor please, this leads up to the main issue and is one of the facts which shows what was done later on. [185]

The Court: Well, Mr. Colby, of course I hope I can depend on you in the statement you are now making to the Court.

(Testimony of H. L. Faulkner.)

Mr. Colby: You can.

The Court: I don't want to take up time unnecessarily receiving elements which are immaterial here and which will not aid me in the least in determining the issues.

Mr. Colby: Might I read you one decision?

The Court: No, I don't want to hear your decisions. I have confidence in you as an attorney. I can't see the materiality of this.

Mr. Colby: Then I will try to explain it to your Honor.

The Court: No, I don't want you to explain it to me. Do you feel that it is a material matter? If you do, I am going to permit you to proceed, but I don't want you to do it unless you feel it is absolutely necessary to do it. It seems to me this case is going to be decided purely upon legal questions, isn't it?

Mr. Colby: No, absolutely not.

The Court: On facts?

Mr. Colby: It is going to depend a great deal on surrounding circumstances.

The Court: Well, all right. Go ahead. There is no limit to what we call surrounding circumstances, you know.

Mr. Colby: I know that, but I think your Honor can rely on me not to prolong this unnecessarily.

Mr. Edises: May my objection go to this entire line of testimony?

The Court: Yes. Overruled. Go ahead.

Mr. Colby: Q. Well, making your answer just

(Testimony of H. L. Faulkner.)

as succinct as possible, what advice did you give the company with relation to any change in their paying wages prior to the enactment or the effective date of this enactment that we are discussing here, October 24, 1938?—and the conditions following that when the act went into effect?

A. Well, I advised them regarding the meaning of the act and the necessity for computation of time on the basis provided in the act.

Q. And do you know, just in a general way, what change was made under your advice?

A. Yes.

Q. What was that?

A. They changed to a computation of the base time or regular time at 44 hours a week and 4 hours overtime. They worked forty-eight hours a week, with the exception of a few men who worked seven days a week.

Q. Do you know how long that method of payment continued?

A. It continued for approximately a year.

Q. And when was it that a change took place?

A. October, 1939.

Q. And what was the occasion of that change, if you know?

A. Yes. The union insisted on changing to a daily overtime instead of weekly.

Q. And the company then after that put in force what system?

A. Put in force the system of paying overtime daily. [187]

(Testimony of H. L. Faulkner.)

Q. That is, the split day?

A. The split day.

Q. And how long did that continue?

A. That continued until May 1, 1941.

Q. Then May 1st was there any other agreement that you had anything to do with or gave any advice on entered into between the men and—or the union and the men, the union representing the men, and the company, between those dates?

A. No. The contract of October, 1939, and the one of May 1, 1940. I was consulted.

Q. And then that contract of May 1, 1940, or May 2, I think it is—— A. Yes.

Q. ——how long did that operate?

A. That is a contract for a year. It operated for a year.

Q. And in that period of time along in December what occurred with relation to these rates?

A. 1940?

Q. Yes, 1940.

A. The Wage-Hour Division notified the company that they couldn't compute the time according to the union contract by splitting the day into two parts, and paying overtime daily.

Q. And they contended that was a violation of the act? A. Yes, sir.

Q. And what did you do in that connection, representing the company?

A. I came down here and consulted with Miss Williams and Mr. Ash and Mr. Daley of the Wage-

(Testimony of H. L. Faulkner.)

Hour Division. That is, Mr. Bradley and myself were over there several times. [188]

Q. Did you consult any other officials of the Wage-Hour Division?

A. Yes, the following March I went to Washington to see General Fleming, who is head of the Wage-Hour Division.

Q. What attitude did he take toward this?

A. He took the same attitude that his office, here, had taken, that notwithstanding Mr. Andrews' opinion, it was wrong to compute overtime daily, and he insisted on going back and adding the two amounts together, the day's pay or regular pay and overtime daily, and computing time and a half on top of that for the last eight hours of the week, and he said—and then he offered to compromise on it, and said if we didn't settle he would sue the company in West Virginia.

Mr. Edises: I move to strike out the entire line of testimony on the additional ground it is hearsay and not binding on any of the plaintiffs.

The Court: Denied. I suppose all of this matter you are referring to now ripened into the stipulation that was entered into?

Mr. Colby: Yes, it culminates in that. However, we have alleged, if your Honor please, that it was the only reason that we submitted ourselves to the jurisdiction of the court by a consent decree, and did not defend in the matter, was because the Administrator threatened to bring this action in West Virginia.

(Testimony of H. L. Faulkner.)

The Court: Yes. [189]

Mr. Colby: And the expense to the company would have been so great that we decided to make some sort of settlement. Now, of course, the record speaks for itself, and in that we reserved all our rights, in that settlement.

The Court: Yes. All right, go ahead. You said something about Mr. Fleming stating to you or your company that they would sue you in West Virginia.

Mr. Colby: Q. And after that what did you do when you returned here?

A. Then we had some more negotiations with Miss Williams and Mr. Bradley and you and myself on behalf of the company.

Q. Who is Mr. Bradley?

A. Mr. Bradley was the president of the Alaska Juneau Company.

Q. What decision was reached?

A. Then we worked out with Miss Williams the provisions for the stipulation and the findings and decree which were entered in this court in April some time.

The Court: April 23, 1941, is that right?

The Witness: That is right, April 23, 1941.

The Court: It was case No. 21834-S.

Mr. Colby: Your Honor please, I would like to——

The Court: I have the papers here before me.

Mr. Colby: Yes, but I want to get these in the record, you see.

(Testimony of H. L. Faulkner.)

The Court: I will take judicial notice of it, if you want to offer the papers. [190]

Mr. Colby: If it should go up on appeal, naturally you wouldn't want your papers withdrawn. I don't know what the practice is in this court.

The Court: You could certify the copies.

Mr. Colby: Oh, yes, at that time. I might just as well put them in the record, then. They are here.

Mr. Edises: Do you have copies of that?

Mr. Colby: I haven't, unfortunately. I will have some made, and if I do I will supply you with them.

The Court: Here is the original.

Mr. Colby: The complaint, the stipulation, and the judgment, those will be entered.

The Court: In case No. 21,834-S.

Mr. Colby: What is the next in order?

The Clerk: Defendants' Exhibit B.

The Court: Let it be one exhibit.

Mr. Colby: Yes, B-1, B-2, B-3, so as to distinguish between the three documents.

(The documents referred to were marked Defendants' Exhibits B-1, B-2, and B-3 in evidence.)

Mr. Colby: Q. And would you have advised the company to make this settlement had it not been for the fact that the threat was to bring this suit in West Virginia?

Mr. Edises: I will object to that on the ground it is incompetent, irrelevant, and immaterial. [191]

The Court: Overruled.

(Testimony of H. L. Faulkner.)

A. No, I would not.

Mr. Colby: Q. Now, Mr. Faulkner, what sort of an operation is this up there in Juneau on the part of the Alaska-Juneau Gold Mining Company?

A. It is a large low-grade gold, gold mine.

Q. How many men are employed in normal times? A. An average of a thousand.

Q. What relationship is there between the prosperity of the community there in Juneau, Alaska, and this mine?

Mr. Edises: That is objected to as incompetent, irrelevant, and immaterial.

The Court: Overruled.

A. Well, it's—it's the only industry in town, in the sense that everything else depends on it, except the Government offices.

Mr. Colby: Q. So that as far as the community is concerned, it is vital to have that mine operating?

A. Yes.

Q. There has been some reference here to a Mr. Metzger, who was the general superintendent of the Alaska Juneau Mining Company. Is Mr. Metzger still alive?

A. No. Mr. Metzger died in June, 1940.

Q. And he was the chief supervising representative of the company up there at that time?

A. He was the general superintendent in charge for a number of years.

Q. Up to the time of his death?

A. Yes, for a great many years. [192]

Q. Now, do you know whether there was any

(Testimony of H. L. Faulkner.)

change in the amount paid the men, take it by and large, any substantial change from the time preceding the October 24, 1938, when the act went into effect, and the time following the act?

A. No, there was no substantial change. There was a slight increase. Every time we made a new contract there was an increase of wages.

Q. Then was there any material change in the general set-up of wages between the time that they operated under the first contract of May 2, 1939 and the contract which was entered into at the request of the employees on October 5, 1939?

A. The October contract resulted in an increase of pay.

Q. Was that very substantial, or——

A. It was substantial. The over-all increase was substantial. I have to explain that to the Judge so he would understand what I mean.

Q. If you will.

A. The change was this. First, under the first contract, when the Wage-Hour Act first went into effect, we paid for the first 40 hours at a certain rate of pay, and then 1½ times that for the remaining eight hours of the week. When the contract was modified in October, 1939, that overtime was carried through every day of the week, so that a certain amount of overtime was paid daily. It was six and a fraction base pay and—six and a fraction hours of base pay or regular pay, and 1 and a fraction overtime, when it was forty-two hours a week—no, it was seven to one, seven to one, seven

(Testimony of H. L. Faulkner.)

hours base pay and one hour overtime, when the time was [193] forty-two hours a week, and six and a fraction and one and a fraction when it became forty hours a week. That resulted in this. Before this was put into effect—and the reason for putting it into effect was this—a man had to work a full week to get overtime. If he lost a day in the middle of the week he got none. Under the new plan he got overtime daily, so his pay was between two and three dollars a week more, and assuming a man worked every day under the old contract, and every day under the split day plan, he got a slight increase of around 16 cents a week.

Q. That was the reason why the men insisted on the change? A. That was it.

Q. Why was it that in the settlement you only went back or you went back and took December 13 as the starting point and May 1, 1941, as the terminal point?

A. You mean in the settlement made in the suit in this court in April, 1941?

Q. Yes.

A. The reason was that the Wage-Hour division decided they would ask for it. They would compute the back wages only to the time that they gave us notice that the Andrews advice was not sound, that their new interpretation was the correct one, and it terminated in May, 1941 because we changed back to the forty-hour week base pay and eight hours overtime.

Q. Prior to that time had you been keeping

(Testimony of H. L. Faulkner.)

the Wage-Hour Division notified by sending them copies of the—sample copies of the pay sheets?

Mr. Edises: That is objected to on the ground that it is immaterial whether the Wage-Hour Division was notified or not, and no acts of the Wage-Hours Division in regard to this controversy can be binding upon the employee plaintiffs in this suit.

The Court: Overruled.

A. The company did. I didn't directly.

Mr. Colby: Q. Yes.

A. And you asked me—pardon me, I didn't finish my answer there. Mr. Colby asked me about the effect of these two contracts and what was the effect of the change. I forgot to put in that when we came to the contract of May, 1940, instead of basing that on a 42-hour week base pay and six hours overtime, the company went directly to a forty-hour week.

Mr. Colby: Q. That was some months in advance of the time required by the statute?

A. That was six months in advance of the time required, yes.

Q. And you paid overtime on the basis of forty hours? A. Instead of 42.

Q. In other words, the company could have waited until October of that year and still continued their 4-hour week basis for regular time?

A. Yes, sir.

Mr. Colby: I think that is all.

Mr. Edises: Your Honor, I move to strike out

(Testimony of H. L. Faulkner.)

all the testimony given over objection on the advice that this witness gave to the defendant as to its rights and duties under the [195] Fair Labor Standards Act.

The Court: Denied.

Mr. Edises: I move to strike out all of the testimony regarding the negotiations or dealings which were had with the Wage and Hour Division concerning this matter.

The Court: Denied.

Mr. Edises: I move to strike out all of the testimony as to the reasons why the company modified or consented to modify its various contracts with the employees.

The Court: Denied.

Cross Examination

Mr. Edises: Q. Mr. Faulkner, throughout all these various changes that you have testified to, changes in the basis of pay, what was the basic work day, how many hours?

A. Eight hours.

Q. Eight hours? That was true, as a matter of fact, even prior to the time that the Fair Labor Standards Act came into effect, was it not?

A. Yes.

Q. And the employees in question worked a regular number of hours per week throughout all this period, did they not?

A. Not all of them. There was interruptions.

Q. Do you happen to know the situation with

(Testimony of H. L. Faulkner.)

respect to the particular employees who are plaintiffs in the original suit, here?

A. You mean about the time they worked?

Q. Yes. A. No, no, I wouldn't.

Q. The records, however, will show, I think, that they worked a [196] regular number of hours per week. When did you, or the company, rather, finally abandon this so-called daily overtime system?

A. May 1, 1941.

Q. That is sometimes referred to as the Poxon plant, is it not?

A. Well, we never referred to it as the Poxon plant, no. The Poxon plant I think was a little different.

A. A little different? Now, in the course of your testimony you referred to various contracts and other documents which you entered into with your employees, on which you relied. At this time I will call upon the defendant to produce the documents testified to, which incidentally are also alleged in the defendants' answer.

My notes show that they are as follows: The Notice to Employees and Wage Scale. A second Notice to Employees and Wage Scale. A Contract of October 5, 1939. The Contract of May 1, 1940. The American Mining Congress Bulletin concerning which testimony was had in the morning session. The letter dated December 13, 1940, from W. O. Ash, Regional Director, Wage and Hour Diviison, to P. R. Bradley, President, Alaska Ju-

(Testimony of H. L. Faulkner.)

neau Mining Company. And a letter dated July 12, 1940 from Baird Snyder, Deputy Administrator, Wage and Hour Division, to the Colorado Mining Association.

These documents have been testified to and are obviously the best evidence of their contents.

Mr. Colby: I will state to the Court that we intend to introduce or offer, at least, practically all of the documents. [197] The one from the Mining Congress is already in evidence and is marked Exhibit A, and the others will be produced, with the possible exception of the letter from the Wage-Hour Administration. I don't believe I have that with me. There is such a multitude of documents and correspondence that that has gotten buried somewhere.

Mr. Edises: Do you refer to the letter from Ash?

Miss Williams: We can supply that, Mr. Colby, if you wish.

Mr. Colby: I have it somewhere in the mass of material, but it has become mislaid.

The Court: The witness wishes to say something.

The Witness: I have the Baird Snyder letter. I have copies of it.

Mr. Colby: That is good, but this is the other letter, the letter to Mr. Bradley, and I don't recall off-hand that I have it here. Otherwise, I have those documents.

Mr. Edises: I have no further questions.

(Testimony of H. L. Faulkner.)

Mr. Colby: I want to ask just one question.

Redirect Examination

Mr. Colby: Q. At the time that the act went into effect on October 24, 1938, was there any law requiring the payment to the men of overtime in Alaska?

A. Yes, sir.

Mr. Edises: I am late with my objection. I believe the question and answer are irrelevant to any issues in this case.

The Court: Overruled. I don't see its materiality. [198]

Mr. Colby: It was really in response to a question raised by opposing counsel, but it is part of the picture that they were already paying overtime up there, and it simply shows good faith on the part of the company.

The Court: Very well. Overruled.

Mr. Colby: That is all, Mr. Faulkner.

The Witness: Pardon me. My answer may be inconclusive.

The Court: Read the answer.

The Witness: I said, "Yes, sir." But that is not all.

The Court: Do you want to add anything to it?

The Witness: Yes, sir.

The Court: Go ahead.

The Witness: In order that I may not be misunderstood, there is what we call in Alaska an eight-hour law for underground miners, that any time over eight hours underground must be paid

(Testimony of H. L. Faulkner.)

time and a half, which has been in effect for twenty or thirty years.

Mr. Colby: That is all. I will ask Mr. Williams to take the stand.

The Court: It is not contended, is it, that the Alaskan law has any bearing in this case, except that it makes your offer in good faith?

Mr. Colby: Yes, and we were already paying overtime.

The Court: That is it.

Mr. Edises: And do I understand that counsel has agreed [199] that he will produce the documents I called for?

Mr. Colby: Oh, yes. This witness is going to identify them.

Mr. Edises: And furnish me copies of them?

Mr. Colby: I will as far as I can. I think I have copies of practically everything.

Mr. Edises: Will you supply me later?

JOSEPH A. WILLIAMS,

called as a witness by defendant: sworn.

The Clerk: Will you state your name to the court, please?

A. Joseph A. Williams.

Direct Examination

Mr. Colby: Q. Mr. Williams, where do you reside? A. In Juneau.

(Testimony of Joseph A. Williams.)

Q. What is your occupation?

A. I am a mining engineer.

Q. And how long have you been a mining engineer? A. Well, since graduation in 1918.

Q. And what has been your connection with the Alaska Juneau Company?

A. I am now general manager. I have been for the past year. Before that I was general superintendent for three years, succeeding Mr. Metzger, who died in 1940.

Q. When you were general superintendent you were the chief officer representing the company in Alaska in connection with its operations?

A. Yes. [200]

Q. And it was only a change of title to change you to general manager? A. That's right.

Q. Whom did you succeed?

A. I succeeded Mr. Metzger.

Q. And Mr. Metzger, it has already been stated, is dead, and you succeeded him when he died, did you, in June of 1940? A. Yes.

Q. What were your duties prior to the time that you succeeded Mr. Metzger?

A. I was assistant superintendent for about ten years.

Q. Did you come into close contact with him?

A. Yes.

Q. And confer with him on various matters that were vital to the company? A. Yes.

Q. And if Mr. Metzger was absent what was your position?

(Testimony of Joseph A. Williams.)

A. Well, I acted as general superintendent when he was absent.

Q. Now, your attention was called, was it not, to the fact that this act had been passed by Congress, this Fair Labor Standards Act, in 1938?

A. Yes.

Q. And did you, as assistant to the manager, Mr. Metzger, take any steps to comply with that act, or find out what it was all about? A. Yes.

Q. And at one time there, there was an idea that it would not apply to Alaska?

A. That is right.

Q. Or to gold mining?

A. That's right.

Q. What is the character of the Alaska Juneau Gold Mine?

A. Well, it is a very large low-grade gold mine, hard rock mine. [201]

Q. And with relation to the character of the ore that it produces and puts through the plant, what can you say regarding its grade?

A. Well, total recovery runs between 90 cents and 95 cents per ton, in all metals.

The Court: You say hard rock. Is that quartz?

The Witness: Yes, that is commonly called a quartz mine.

Mr. Colby: Q. And how does that bear with relation to the values in other mines, generally?

A. Oh, it is very, very much lower grade than any other hard rock mine in the world.

The Court: Lower grade than any?

(Testimony of Joseph A. Williams.)

The Witness: Yes, than any hard rock mine.

The Court: You say 90 cents total?

The Witness: Between 90 cents and 95 cents per ton. We recover that per ton.

The Court: Where were the Treadwell mines up there?

The Witness: They were opposite Alaska Juneau on Douglas Island.

The Court: They used to realize about $2 a ton, didn't they?

The Witness: Yes, their ore went $2.50 a ton. That is considered low grade.

The Court: In the same locality?

The Witness: About a mile west.

The Court: Is there any connection at all?

The Witness: No, they lie more or less parallel rather [202] than along the same strike. They are in different zones.

The Court: I see.

Mr. Colby: Q. Now, Mr. Williams, what quantity of ore would you put through on an average, during normal operations, in a day?

A. We put through between twelve and thirteen thousand tons a day.

Q. What relation is there between the low-grade ore and the quantity you put through?

A. Well, low costs, of course, are absolutely necessary to profitable operation, and we obtain low cost by using that high tonnage.

Q. And if your costs in any line, wages, or in

(Testimony of Joseph A. Williams.)

the actual treatment of ore, and so on, should rise materially, what would happen?

Mr. Edises: That is objected to as irrelevant.

The Court: Overruled.

A. Well, we would lose money. The cost of labor is always—has been one of the big items in the total cost.

Mr. Colby: Q. In other words, in order to produce in that mine you have to produce at a very small margin of cost in operation? A. Yes.

Mr. Edises: May I have an objection to this line of testimony, your Honor?

The Court: Yes, overruled. Exception noted.

Mr. Colby: Q. Can you state what the wages of the Alaska Juneau were with relation to other mines in Alaska? [203]

Mr. Edises: That is objected to on the ground it is immaterial.

The Court: Overruled.

A. We paid the best, the highest wages of any large hard rock mine anywhere.

The Court: Well, you say other mines in Alaska.

The Witness: Oh, I beg pardon, in Alaska. That is true. We paid higher than any hard rock mine in Alaska, because there are very few there.

The Court: How many are there?

The Witness: Oh, one or two. They are small. Their scale of operation is nothing like ours.

The Court: Name them.

The Witness: Hirst-Chichagof.

The Court: Is that in the same locality?

(Testimony of Joseph A. Williams.)

The Witness: It is about a hundred miles from Juneau.

The Court: And the others?

The Witness: Well, there was one—there was a little mine up around Anchorage in the Willow Creek District, the Independence Mine, but they employed perhaps a hundred men, whereas we normally employed a thousand men, so they are not comparable.

The Court: Yes.

Mr. Colby: Q. Now, when this act became effective, what did you do with relation to the wages of the men?

A. We reduced [204] the basic wage, so that along with the regular wage plus the overtime which we paid at the end of the week, the earnings would be just a little more than they were before, about 3 per cent, as I remember.

Q. And you paid on a weekly basis?

A. We paid overtime on a weekly basis at that time.

Q. In order to give notice to the men, what did you do regarding this change?

A. Well, we posted notices on several bulletin boards throughout the property, giving the reason for it, and a copy of the new wage scale.

Q. I will show you a notice with a wage scale attached to it.

The Court: Did Mr. Andrews say that this was the lowest grade hard rock mine in the world?

The Witness: Yes, sir. Even at the Climax Mo-

(Testimony of Joseph A. Williams.)

lybdenum mine it is a rather low grade mine. It is a big mine, but still the yield per ton would be a couple or three dollars.

The Court: Per ton?

The Witness: Per ton, yes, and ours is under a dollar.

The Court: Yes.

Mr. Colby: Q. I will show you this document, which is a notice to employees dated October 24, 1938, attached to which is a scale of wages, and ask you if that is a copy of the notice that was posted at that time? A. Yes.

Q. And what became of the original? Was the original posted?

A. Usually we had carbon copies, probably six or seven carbon copies, and an original, and the original was posted. [205]

Q. Do you know where the original is?

A. No, I——

The Court: Well, it was posted?

The Witness: It was posted, and it probably became destroyed.

Mr. Colby: I will offer this as the next in order.

(The notice with wage scale attached dated October 24, 1938, was marked Defendants' Exhibit C in evidence.)

(Testimony of Joseph A. Williams.)

DEFENDANTS' EXHIBIT C

October 24, 1938.

NOTICE TO EMPLOYEES

In Order to Comply With the Wages and Hours Law and Not Reduce the Weekly Earnings of Our Employees, We Will Temporarily, and Subject to Change When Other Arrangements or Determinations Are Made, Adopt the Following Plan:

48 Hours Per Week Will Be Worked as Usual,—44 Hours Regular Time, 4 Hours Overtime.

Wages Will Be Adjusted So That 44 Hours Regular Time Plus 4 Hours Overtime Will Approximately Equal the Present Wage.

In the Case of Those Few Men Who Work Seven Days a Week, Adjustment Will Be on the Basis of 44 Hours Regular Time and 12 Hours Overtime.

The Wages and Hours Law Is Effective Starting October 24, 1938.

ALASKA JUNEAU GOLD
MINING COMPANY.

Effective October 24, 1938, Wages Will Be Adjusted in Accordance With the Following Schedule:

(Testimony of Joseph A. Williams.)

Old Rate Per Day	New Rate for 6-Day Men	New Rate for 7-Day Men
$4.75	$4.56	$4.32
5.00	4.80	4.56
5.25	5.04	4.80
5.50	5.28	5.04
5.65	5.44	5.12
5.80	5.60	5.28
5.85	5.68	5.36
6.10	5.92	5.52
6.35	6.16	5.76
6.60	6.40	6.00
7.10	6.88	6.48
7.35	7.12	6.64
8.00	7.68	7.28
8.50	8.16	7.68

Mr. Colby: Q. I will hand you a notice dated November 1, 1938, also with a schedule attached, and ask you if you recognize it and can identify it.

A. Yes.

Q. And what is that?

A. That was a notice that we posted about a week later than the other one, and the purpose of that was to increase the wages a few cents in order to compensate for any loss of overtime that may have been brought about by some enforced lay-off.

The Court: Was it a further increase?

The Witness: A little bit. We wanted to make

(Testimony of Joseph A. Williams.)

sure that we would pay more than we had previous to the Wage-Hour Law, and we frequently—or I should say about once a month, we blasted powder drifts in the mine, and that forced the man on day shift to lay off to allow the smoke to escape from the mine, and we did that on day shift, so that the day shift men would be forced to lay off periodically, while the other men on the other two shifts would work as usual. It seemed a little unfair to the day-shift men, so to compensate for the overtime, which [206] would be paid at the end of the week, we raised the wages a little bit there.

Mr. Colby: Q. You found out there was a little inequity there?

A. Some of our employees called our attention to the fact. The day shift men did. Of course, we investigated it right away, and we hadn't made any payments. There was no pay day involved, so far, so we simply changed the notice, and about a week later——

Mr. Colby: I will offer the second notice of November 1st as Defendants' next in order.

(The document was marked Defendants' Exhibit D in evidence.)

DEFENDANTS' EXHIBIT D

NOTICE

Effective November 1, 1938, the Recent Wage Adjustment Is Being Revised Upward in Order to

(Testimony of Joseph A. Williams.)

Have It Apply More Evenly to All Employees and Furthermore to Compensate the Employee for the Overtime He Might Lose Occasionally Through No Particular Fault of His Own.

As Pointed Out Previously, We Are Making This Arrangement Temporarily and in Accordance With the Provisions of the Recently Enacted Wages and Hours Law,—Altho We Have Been Advised by Our Counsel That the Provisions of This Law Will Not Likely Apply to the Gold Mining Industry in Alaska.

Effective November 1, 1938, Wages Will Be Adjusted in Accordance with the Following Schedule:

Old Rate Per Day*	New Rate for 6-Day Men	New Rate for 7-Day Men
$4.75	$4.72	$4.40
5.00	4.96	4.64
5.25	5.20	4.88
5.50	5.44	5.12
5.65	5.52	5.20
5.75	5.60	5.28
5.80	5.68	5.36
5.85	5.76	5.44
6.10	6.00	5.60
6.35	6.24	5.84
6.60	6.48	6.08
6.85	6.72	6.32
7.10	6.96	6.56

(Testimony of Joseph A. Williams.)

Old Rate Per Day*	New Rate for 6-Day Men	New Rate for 7-Day Men
7.35	7.20	6.72
7.60	7.44	6.96
7.80	7.60	7.20
8.00	7.76	7.36
8.50	8.24	7.76
9.00	8.72	8.24

*This is the rate in effect previous to October 24th.

Mr. Colby: Q. And at this time did you have any written agreement with the men?

A. No, we had at that time—we had two unions. We had an A. F. of L. union and a CIO union, and neither one was the bargaining agency.

Q. You didn't enter an agreement, then, because you did not know which body to deal with, is that it? A. That's right.

Q. What happened with regard to the unions and the union situation there?

A. Well, a little later on there was a hearing conducted by the National Labor Relations Board, and in December, 1938, an election was held to determine the bargaining agency.

Q. And what was the result of that?

A. The CIO union won the election.

Q. And do you know about when that took place?

A. Well, the [207] election was in December, and

(Testimony of Joseph A. Williams.)

it seems to me we received notification from Washington in January, the latter part of January, I think it was.

Q. And from what source would that be?

A. That would be from the National Labor Relations Board, in Washington, D. C.

Q. And what was the purport of the notice?

A. Notifying us that the CIO union was the designated bargaining agent.

Q. Then what happened after that?

A. Well, a few months after that the union signified its wishes to negotiate for a written contract.

Q. I will show you this contract—I will give Mr. Edises a copy of this—I will show you an agreement dated May 2, 1939, entered into between the Alaska Juneau Gold Mining Company and the Juneau Mine & Mill Workers Union, Local 203, affiliated with International Mine, Mill and Smelter Workers Union. That is the union, is it not, that you stated had been formed and had received the certification of the Labor Board? A. It is.

Q. I will ask you to examine this and see if that is the agreement that you entered into with the union at that time. A. It is.

Mr. Colby: We will offer this in evidence as the next in order.

(The contract was marked Defendants' Exhibit E in evidence.)

Mr. Colby: Q. In this I believe you have already stated the method of paying wages was on a weekly basis, with the [208] overtime calculated

(Testimony of Joseph A. Williams.)

after the number of hours called for by the act had been worked?

A. Thats correct, a 44-hour week at that time.

Q. Now, what happened after that agreement—that agreement, as a matter of fact——

Your Honor does not want this read for your present information?

The Court: Not now, no. If you wish, it may be deemed read in evidence.

Mr. Colby: Yes, I would like to have all these documents deemed read for the purposes of the record.

The Court: Yes.

Mr. Colby: Q. Did the contract provide for the length of time it should operate or be in operation?

A. Well, it provided a year. It was to run a year, but there is a provision in there for reopening the contract on thirty days notice by either party.

Q. Was that taken advantage of?

A. Yes, a few months later the union notified us that they wished to renegotiate part of the contract.

Mr. Colby: I will hand to opposing counsel a copy of this contract, which is dated October 5, 1939, and I will show the witness this contract, also, entered into between the company and the same union.

Q. I will ask if that is the contract that was entered into [209] at that time? A. Yes.

(Testimony of Joseph A. Williams.)

Q. And these contracts that I am handing you are the contracts that have been executed and are in the company's files? A. That's right.

Mr. Colby: I am going to ask the indulgence of the court, and also of counsel, to withdraw these original documents and substitute copies for them. Is that satisfactory?

Mr. Edises: That is agreeable, yes.

Mr. Colby: I will offer this for admission.

(The document was marked Defendants' Exhibit F in evidence.)

Mr. Colby: Q. What change was there between this contract of October 5, 1939, with respect to the wages and rates, time?

A. Well, there wasn't much change in the rates, but the method of computing the overtime was altogether different. We used the split day method in this agreement.

Q. And do you know why this agreement was entered into?

Mr. Edises: Just a moment. I will object to that as calling for the opinion and conclusion of the witness.

The Court: Overruled.

A. Several of the men or employees objected to the former method of computing overtime at the end of the week. It worked to the disadvantage of anyone who did not work steady, and they talked about the split day method that was being used at the Butte Mines at that time, and they talked about it quite a while before they opened the subject.

(Testimony of Joseph A. Williams.)

They insisted on a [210] split day method or a greatly increased rate of pay, or they wanted something out of it.

Q. And they gave the notice that is required under that contract of May 2nd in order to reopen the negotiations? A. Yes.

Mr. Colby: This will be the next in order, and I will substitute copies later.

Q. Now, I will hand you an agreement dated May 1, 1940—and I am also handing opposing counsel a copy of this agreement—between the same parties, the company and the union, and I ask you if you recognize that agreement? A. Yes.

Q. And this is the original agreement, is it, that is entered into that is in the company's files, and you brought it from Alaska as you did the others, taking them from the company's files, and it is signed originally by the parties representing the company, and also the parties representing the union? A. That's right.

Q. What change, if any, was made in the method of payment, either wages or hours, or both, in this contract?

A. Well, the plan used was the same. It was still the split day plan. We used 6.6 and 1.4 for the division of the day.

Q. In place of 7 and 1?

A. In place of 7 and 1, and there was really no—there was a little increase made in pay, but of course the base rate was changed to a new base rate.

(Testimony of Joseph A. Williams.)

Q. I neglected to go into the question——

I will offer this next in order. Will that be satisfactory? [211]

The Court: Yes.

(The document was marked Defendants' Exhibit G, in evidence.)

Mr. Colby: Q. I neglected to ask or to go into a little more detail on this question of the loss of a day and the effect on the men. How would they lose a day?

A. Well, they could lose a day in various ways. There was this powder drift that I mentioned, and of course there would be sickness or illness in the man's family.

Q. Or he might be ill, himself?

A. Ill, himself, and transportation in the winter time might cause a man to lose a shift, and underground especially, there are men who have the habit of losing a day or so occasionally. That is quite customary.

Q. Especially with underground men, is it not?

A. Yes.

Mr. Colby: I find, if your Honor please, that we don't have the original of the contract entered into in May of 1941, and they have wired for that. I have a copy of it here.

The Court: Use the copy.

Mr. Colby: Will that be satisfactory?

Mr. Edises: If I may look at it.

Mr. Colby: Oh, yes. We will have a copy of it made.

(Testimony of Joseph A. Williams.)

Mr. Edises: This is after the——

Mr. Colby: This is immediately after.

Mr. Edises: After the consent decree?

Mr. Colby: Yes.

Mr. Edises: We have no objection. You will furnish me a [212] copy?

Mr. Colby: I will furnish you a copy, and as soon as the original arrives from Alaska I will have a complete copy made, because this has not got the signatures, as I recall it, and the exact date is not here, although we know it is May of that year—— No, the signatures are not there. For the present we will have it in the record and substitute the other when it arrives.

(The agreement of May, 1941, is marked Defendants' Exhibit H in evidence.)

Mr. Colby: Q. When Mr. Robertson was discharged, did he state to you that he might bring a suit to collect back wages? A. Yes.

Q. And did you have any conversation with Mr. Sam Dapcevich after this suit was started down here regarding the fact of his being a plaintiff in the suit? A. I did.

Q. And what did he state?

A. He said that he did not know that by signing his name to a slip of paper that it meant a lawsuit against the company.

Q. Now, in your operations there in Alaska, do you do anything besides mining gold and silver and so on, and I refer particularly to the power situation.

(Testimony of Joseph A. Williams.)

A. Oh, we supply the community with power and light, and also some water.

Q. That is used entirely within the Territory of Alaska?

A. Yes, right on the Gastineau Channel, both sides of the [213] Gastineau Channel.

Q. Is there any use made of the waste from the mine, the waste rock?

A. Yes, it is used extensively for filling purposes along the waterfront, and recently the Army used over 500,000 cubic yards of it for filling in a large area which they are now using.

Q. We have introduced here exhibits showing a summation of the metals that are produced, the precious metals, and also lead, showing that there is about 2 per cent lead value. Does that lead in and of itself pay the company at all to pay the mine?

A. No, the lead without the gold and silver values would not yield a profit at pre-war prices for lead.

Q. And that is because of what factors?

A. Well, transportation costs and mining costs, and smelting charges.

Q. And it is because the lead is combined, is it, with the gold and silver in the concentrates that you ship the lead?

A. Yes, we save the lead in order to save the combined precious metal values.

Q. In your dealings with the men there I assume that you dealt with the men regularly in conjunction with Mr. Metzger in relation to wages

(Testimony of Joseph A. Williams.)

and so on of the union, and did you ever exercise any coercion or any undue influence or try and force the men to get over their objection to adopting rates and wages that you thought should go into effect in operation? A. No.

Mr. Edises: That is objected to as self-serving, and as [214] calling for the conclusion and opinion of the witness.

The Court: Overruled.

A. No.

Mr. Colby: Q. I neglected to ask you, in connection with this May 1, 1941, contract which we have just put in, but which we are going to get the original for, did you make any—what was the change that was made, if any?

A. Well, went back to the weekly method of paying overtime. That was a 40-hour week at that time, and we had to raise wages, as I remember it, about 6 per cent at that time.

Q. You went back to the general method that you had had before you put the split day into effect, is that true? A. That's true.

Mr. Colby: That's all.

Cross-Examination

Mr. Edises: Q. Mr Williams, I have before me Defendant's Exhibit No. H, which is the agreement of May, 1941. I notice that in paragraph 9 of that agreement, which deals with hours, you have a clause dealing with the question of overtime, which appears to be almost identical with a clause appearing in paragraph 8 of Defendants' Exhibit

(Testimony of Joseph A. Williams.)

G. The only apparent difference is that in Defendants' Exhibit G there appears the following sentence: "Overtime will be computed daily," and there is also written in in handwriting in the copy you gave me: "No change from the present hours."

Mr. Colby: Pardon me, I will clear that up for you, because it was my oversight and my mistake. On some of these originals there are pencil notes and some writing here.

Q. Has that anything to do with the contract as originally entered into?

A. No, I think most of that—I think all of that was written in for the purpose of making a new contract the following year.

Q. Do you have any copies of this contract or did you have any copies of this contract there at that time? A. No, just had one copy.

Q. Is that the reason you made notations for the new contract? A. On the old one.

Q. On the one you had, which was your original?

A. That's correct.

Mr. Colby: I should have cleared that up.

Mr. Edises: I see, then.

Q. I take it the handwritten material in the contract of May, 1940, is not part of the contract?

A. I think that is right.

Q. Do you agree with that?

Mr. Faulkner: That's right. I did that.

Mr. Edises: Q. I see, leaving the handwritten portion of it, then, the only difference between that overtime clause in the 1940 contract and the 1941

(Testimony of Joseph A. Williams.)

is that in the 1940 contract there appeared the sentence, "Overtime will be computed daily": Is that right? A. That's right.

Q. Now, you testified that prior to the execution of the May, [216] 1940 contract, Defendant's Exhibit G, you had the daily overtime system, but that it was operated on a 7-hour so-called straight time and one hour so-called overtime basis, is that right? A. That's right.

Q. And the only modification in that regard which was made in the May, 1940, contract was that instead of seven hours of so-called straight time it became 6.6 hours, is that correct?

A. No, the division there is right, 6.6 and 1.4, but the base rate was changed, you see.

Q. The base rate was increased slightly or somewhat? A. No, it was decreased.

Q. It was decreased?

A. Yes, because of the fact there would be more overtime, you see.

Q. Otherwise, by virtue of the Fair Labor Standards Act, the weekly take of the employees would have increased, is that right?

A. Well, we aimed to not lessen his weekly take.

Q. In other words, you aimed to keep the wage the employee received the same, despite the fact that under the act you would have been required to pay more overtime?

A. We aimed to give him a little more.

Mr. Colby: It is argumentative, it seems to me. I object to that question.

(Testimony of Joseph A. Williams.)

Mr. Edises: I don't mean to argue. I just want to get at the fact.

The Court: Yes. Overruled. Go ahead. [217]

Mr. Edises: Q. Your purpose throughout these changes was to keep their weekly earnings substantially the same, isn't that true?

A. Yes, that's true.

Q. Had you not made these changes, and had the employees continued to work the same number of hours per week, their weekly earnings would have been greater, isn't that correct?

A. That's correct.

Q. Now, Mr. Williams, you are now the general manager, and you have been associated with this company for a long time. Do you know the parties or persons who were named as parties plaintiff in this suit?

A. I know most of them, I am sure. If I ran down the list, I think I could tell you.

Q. Would you mind doing that, please?

A. One of the men is now deceased.

Q. Which one is that?

A. Marko Dapcevich.

Q. Marko Dapcevich. You dont believe he was deceased at the time he signed the authorization, do you? A. No, sir.

Q. Perhaps it will be quicker if you simply indicate any of them that you do not know.

A. I don't know Lynn E. Pope, nor Stanley Eneberg. I think I know the rest of them.

(Testimony of Joseph A. Williams.)

Q. Now, then, you know the plaintiff, E. E. Robertson, of course? A. Yes.

Q. Now, apart from Mr. Robertson, who was a watchman, as he testified here, these other persons were miners, or did they work in the mill?

A. Well, they worked at various places. [218] There are no miners there.

Q. Suppose you run down the list there and tell us the type of work done by each of the parties you know personally.

A. Behrends was a surface laborer. Marko Dapcevich was a surface laborer.

Q. Surface?

A. Laborer. He did work on the surface. Sam Dapcevich was the same. Raymond Haydon was a power plant operator.

Q. A what?

A. A hydroelectric power plant operator.

Q. Yes.

A. Boyd E. Marshall was a mill worker. Richard Marshall worked as a boss in our waste disposal plant. Ernest McGilligan, I think this must be, is also a power plant operator. Lynn Pope I do not know. E. E. Robertson was a night watchman. Emil Rundage operated a surface hoist. Hall Windsor was a linesman on the electric power line. Stanley Eneberg I do not know. Ivan DiBoff——

Q. I am sorry. Windsor was what?

A. Hall Windsor was a linesman on the electric power line. I don't know Stanley Eneberg. Ivan DiBoff was a laborer. Paul Cvorovich was a la-

(Testimony of Joseph A. Williams.)

borer in a surface gang. Frank Maver I think was a hoistman underground.

Q. That name, please?

A. Frank Maver. Virgil Newell, a power plant operator. W. S. Kljaich was either a laborer or a carpenter's helper on the surface crew. Roy Banta I think was a linesman, and Mark Storms hasn't worked at the Alaska Juneau for—oh, I would say about six years. [219]

Q. What was his——

A. He was an underground man at the time he worked there.

Q. A miner? A. He was a miner, yes.

Q. These were all surface workers, I take it, then, with the exception of Storms and Maver, and their work was in connection with what operation, the mill? A. I beg pardon?

Q. The mill, the smelter, or what?

A. No, the mine.

Q. Can you state a little more fully the general operation their work was connected with?

A. The general operation of Maver and Storms was in the mine. Storms, himself, was a miner who broke ore in the mine, or did development work in the mine, and Maver operated a small hoist in the mine and hauled supplies from one level to another, possibly.

Q. And these surface workers were connected with what general operation?

A. Well, it might be anything. It would be digging footings, or handling any material, making

(Testimony of Joseph A. Williams.)

concrete, and that sort of work, in connection with just the general operations.

Q. Operations connected with your basic activity of handling or treating ores, is that correct, that is, not necessarily directly connected?

A. No, they wouldn't be directly connected. They would sometimes be quite remote. They might be stringing a telephone line or something like that, or working on the waste dump, making a concrete form, or some such thing.

Q. But in general, it is a fact, is it not, that these people were part of your organization and connected with your basis— [220] they did work for you regarded as necessary to your operations, is that not correct?

A. Well, some of them did.

Q. Can you indicate any who were not connected in some way with your basic operations? Weren't they all in one way or another? In other words, to present an extreme case, if one of them was a beauty operator you would see my point, that they were not connected with your operation, but in one way or another they were all connected with work of mining and handling ore, is that not true?

A. Yes.

Mr. Edises: No further questions.

Redirect Examination

Mr. Colby: Q. In connection with the functions of these men, take for instance the linemen, they might be working, might they not, on a line

(Testimony of Joseph A. Williams.)

that would have direct connection with the delivery of power to the light company, the light and power company that supplied the local community, might they not?

A. Well, the light company took off from our tower, and we really had nothing to do with the line from there on.

Q. Then your linemen would not be connected with their operations? A. No.

Q. There is one thing I overlooked, and that was in relation to the payments that were made under this order of court. You are familiar with those, are you not? That is, the payments were made—that is, of July, 1941? A. Yes.

Q. And the data that has been presented here, copies of which [221] went to the opposing counsel, set forth those payments correctly, do they?

A. Yes.

Mr. Colby: Now, if your Honor please, if we could have a recess of about ten minutes, I can determine whether I have overlooked anything that might be essential to the case.

The Court: Very well, we will take a ten-minute recess.

(Recess.)

Mr. Colby: Just one or two questions I want to ask Mr. Williams, and in that connection I will not ask Mr. Williams this, because he did not receive the letter, but Mr. Faulkner knows of it and I imagine counsel will stipulate this is the letter received by the company from Miss Williams, of the

(Testimony of Joseph A. Williams.)

Wage and Hours Division, the one referred to in the answer.

Mr. Edises: Yes.

Mr. Colby: And you have had a copy of this?

Mr. Edises: Yes, I have seen a copy of it.

Mr. Colby: This is a copy that has been furnished. You don't object to its being a copy?

Mr. Edises: No, no.

Mr. Colby: Because, as I say, I have mislaid the original somewhere. It will take a little time to look it up.

The Court: Very well.

Mr. Colby: We will introduce it in evidence as the next exhibit in order.

(The document was marked Defendants' Exhibit I in evidence.) [222]

DEFENDANTS' EXHIBIT I

785 Market Street
San Francisco, California
December 13, 1940

Regional Director LE:DMW:HL
Mr. P. R. Bradley,
President, Alaska Juneau Gold Mining Co.,
Crocker Building,
San Francisco, California.

Dear Mr. Bradley:

In accordance with the request made by you and Mr. Herbert L. Faulkner, attorney for the Alaska Juneau Gold Mining Co., at our conference in this

(Testimony of Joseph A. Williams.)

office yesterday, I am writing this letter to advise you of the general nature of the violations of the Fair Labor Standards Act disclosed by the report on the inspection of the company's mining operations at Juneau, Alaska.

The report indicates that the company has failed, since the effective date of the act, to compensate its employees for overtime hours in accordance with the provisions of section 7.

At the time the act became effective, the company made certain so-called "adjustments" in the rates of pay and thereafter, until about October, 1939, purported to pay overtime for hours in excess of 44 a week on the basis of these adjusted rates. After October, 1939, the company purported to pay overtime for a certain number of hours in the normal workday, on the basis of the "adjusted" rates, and attributed such payments to overtime due under section 7 of the act. Inasmuch as the facts are within your knowledge, I shall not attempt to summarize them here.

It is the position of the Division that the regular rate of pay on which overtime is paid pursuant to the provisions of section 7 of the act, must be calculated on the basis of the wage scale at which the employee is employed, and not on the basis of "adjusted" rates adopted for the purpose of calculating overtime. In this connection, I call your attention to paragraphs 16-18 and 22 of Interpretative Bulletin No. 4.

Furthermore, although the Division will regard

(Testimony of Joseph A. Williams.)

compensation paid by the employer for overtime hours pursuant to agreement between him and his employees as compensation paid for overtime hours pursuant to section 7 of the act, it is our opinion that the additional compensation made by the company for hours in excess of a certain number in the normal workday does not fall within the category of compensation for overtime hours. It is our opinion that overtime hours are hours worked outside the normal or regular working hours, or over the number specified in section 7 of the act. In this connection, your attention is directed to paragraph 69 of Interpretative Bulletin No. 4, and to example (4) on page 18 of the bulletin. We regard the employees of the company as employed, after October, 1939, at two straight-time rates of pay, one rate applying to certain of the hours of the normal workday, and the other rate applying to certain other hours of the normal workday. Under these circumstances, the "regular rate" on which overtime is to be calculated under section 7 is the average hourly rate for the week, computed by dividing the weekly earnings at both rates by the total number of hours worked. (See par. 14 of Interpretative Bulletin No. 4).

With respect to the employees known as "contractors," the company failed in another way, in addition to those enumerated above, to calculate the "regular rate" in accordance with the requirements of section 7. It appears that the "contractors" are compensated at a base rate (similar to the rate for

(Testimony of Joseph A. Williams.)

other employees), plus a bonus based on production. In calculating the "regular rate" on which overtime must be paid under section 7 of the act, the company did not take into account the production bonus. The bonus, being a part of compensation, must, of course, be included in the regular rate on which overtime compensation is calculated. (See par. 7, Interpretative Bulletin No. 4).

Very truly yours,
WESLEY O. ASH,
Regional Director

By DOROTHY M. WILLIAMS,
Regional Attorney

Mr. Colby: Q. Now, Mr. Williams, if a man worked only half a day up there at the mine at any time, what pay did he receive?

Mr. Edises: Now, will we please have the time fixed, so that we will know what period we are referring to?

Mr. Colby: We will refer first to the period under the split day plan.

A. Well, if he worked—say we were working under the 7 and 1 plan and the man worked, we will say, 5 hours on—5 hours, the first 5 hours of that day would be paid for at the regular rate.

The Court: What is the 7 and 1 plan?

The Witness: That would be 7 hours regular time and 1 hour overtime for that day's work.

(Testimony of Joseph A. Williams.)

Mr. Colby: That is the split day plan.

Mr. Edises: We would object to the use of that terminology in questioning the witness, your Honor. I mean, the words "regular rate," or "regular time," because the issue in the case is what is the regular rate of pay.

The Court: Well.

Mr. Colby: Q. Put it this way: He would receive the rate that is provided for in the or under the contract, the straight rate for that period of time? A. That is right, yes.

Q. And he would receive no overtime?

A. No overtime. The only way he would receive overtime would be for him to work the [223] full shift, or part of that seventh hour or eighth hour.

Q. In other words, this split day plan did not involve any fictitious rates or doctoring, as they sometimes refer to?

Mr. Edises: I will object to that on the ground that it calls for the conclusion of the witness, and calls for his opinion on the very issue in the case.

The Court: Well, let us regard it as opinion. Overruled.

A. None, whatever.

The Court: Those rates you mentioned, you mentioned fictitious, and the other word?

Mr. Colby: Doctored.

The Court: What is that?

Mr. Colby: Bookkeeping rates. That is, some of the cases hold that these rates—and they hold

(Testimony of Joseph A. Williams.)

against the companies when the rates have been doctored up and are really not the rates that the man is paid, but they are doctored up to look that way and comply with the act, and yet the man is paid something different. That is the point I want to bring out.

The Court: What they were paid now is the amount that was fixed by the contract, is that right?

The Witness: That's right.

The Court: What were the wages paid?

Mr. Colby: And of course the same thing applies to 7 and 1 as it does to the other division.

The Court: What other divisions? [224]

Mr. Colby: The 6.6——

The Witness: 6 and 2 for a 7-day man. The next year it would have been 6.6 and 1.4.

The Court: Will you explain 6 and 2? What is that?

The Witness: 6 and 2 was the division of the day for the the 42-hour week, for a man who worked 7 days. If he worked 7 days there would be fourteen hours overtime to be distributed over 7 days, over the 7 days that he worked, you see, which would be giving you two hours per day. That was the way we distributed the 14 hours over the 42.

The Court: Why do you call it 6 and 2.?

The Witness: Well, six hours regular time and two hours overtime would add up to make your eight-hour shift.

The Court: I see. Now, then, the other one.

The Witness: The 7 and 1?

(Testimony of Joseph A. Williams.)

The Court: No, you have explained that.

The Witness: When we came to a 40-hour week we would have eight hours overtime to distribute over six days in one case, which would actually work out to 1-1/3 hours overtime per day. However, we gave the employees the benefit of a fraction there and we made it 1.4 instead of 1.33.

The Court: You have mentioned 7 and 1, 6 and 2, and there was another designation. What was the other one?

Mr. Colby: He has just explained that now.

The Court: He has explained it, but how is it designated? [225]

Mr. Colby: It is just a division, a split-day division by——

The Court: I know. We have 7 and 1. We have 6 and 2. What was the other one?

Mr. Edises: There was no 6 and 2, your Honor.

The Court: Didn't I hear 6 and 2?

Mr. Colby: 6 and 2 was for a 7-day man.

The Witness: Under a 42-hour week.

Mr. Colby: As distinguished from a 6-day man.

Mr. Edises: I am sorry.

The Court: He mentioned a third one.

Mr. Colby: He was explaining that.

The Court: I am asking you: If it should appear in the testimony or your argument, I would like to know what it is.

Mr. Colby: Your point is very well made, Judge. I had brought out the fact that the company gave the men the benefit of the difference, because when

(Testimony of Joseph A. Williams.)

they divided so as to get this split day plan that the union asked for, it worked out 1-1/3 to 6-2/3.

Q. That is correct, isn't it? A. Yes.

The Court: Was that the 6-2?

Mr. Colby: That was the 6.4. and became——

The Court: That is the last one, then?

The Witness: That is the last one, 40-hour week.

The Court: 7-1, 6-2, and 6-4? [226]

Mr. Colby: No, 1.4 and 6.6, I should say.

The Witness: That was for the 40-hour week.

Mr. Colby: Q. In other words, when they divide to get the result, it came out 1-1/3 in one case, 6-2/3, but they favored the men when they put it down. Instead of working with fractions—they couldn't work with fractions very well, so they called it 1.4, isn't that a fact?

A. Yes, that is right.

Q. And in the other case they called it 6.6?

A. That is right.

The Court: Mr. Reporter, could you go back to the beginning when this witness was called back on the stand and see what designations were made? There was 7.1 first, and 6.2, and what was the other one?

(The reporter read the record as requested.)

The Court: There is 7.1, 6.2, and this last one that has been just explained by counsel here in his questions that he asked you, is that right?

The Witness: That is right. The last one applied to the 40-hour week. The first one applied to the 42-hour week.

(Testimony of Joseph A. Williams.)

The Court: It is difficult sometimes to follow this.

Mr. Colby: I know it is. It was difficult for me to comprehend this, and this difference between 7.1 and 6.2 was in the same contract, because there were men on different hours.

The Court: Yes.

Mr. Colby: There is just one other matter that I want to ask by way of conclusion. [227]

Q. You have stated that the margin of profit was very small here because of the low grade of the ore, and that low costs are quite essential. What has happened to the company immediately shortly after the period that we have been discussing here with relation to whether it is a paying proposition or has gone in the red?

A. We have lost money.

Mr. Edises: I will object to that as immaterial and irrelevant.

The Court: Overruled. I think it is important to know these facts. You say it has gone in the red?

The Witness: Yes. Our earnings got less and less, and toward the end of 1942 we lost money one month, and then in all of 1943 except one month we operated at a loss.

The Court: What was that due to, the lack of quantity of ore?

The Witness: Yes, partly, and mostly on account of an increased labor cost.

The Court: Well, now, you say mostly. I sup-

(Testimony of Joseph A. Williams.)

pose some months you get a quantity of ore that would yield a higher rate than other months?

A. That is quite true.

The Court: And it has been running in the red for some time?

The Witness: All of 1943 except one month.

The Court: Is it running now?

The Witness: No, we are closed down now.

The Court: Why, because you can't afford to operate? [228]

The Witness: Because we can't afford to operate. Labor costs have increased, cost per hour.

The Court: To such an extent that you cannot run the mine, is that so?

The Witness: That is so.

The Court: Tell me—I don't know that it has anything to do particularly with this case, but I would like to know—you say when you speak about below surface, what do you mean? Is this a mine where you run into the side of a mountain, or dig shafts?

The Witness: We go into the side of a mountain, and also go down from a point inside the mountain.

The Court: How far do you go down?

The Witness: A thousand feet below sea level.

The Court: How many feet below the surface?

The Witness: About four thousand feet.

The Court: Below the surface?

The Witness: Yes.

Mr. Colby: I might explain to your Honor. The mountain comes down where the mine is, and they

(Testimony of Joseph A. Williams.)

run in at sea level and hit the vein, and then they——

Q. How many feet is it up to the outcropping?

A. About 3000 feet.

Q. And you go down a thousand feet after you hit the vein by the shaft? A. Yes. [229]

The Court: It is about a thousand feet below sea level?

The Witness: That is correct.

Mr. Colby: Because the adit or entrance is at sea level.

The Court: Yes. How long has this mine been in operation?

The Witness: It has been in operation since 1917 on this scale of operations.

The Court: And does the evidence show here the extent of its operation in any way?

Mr. Colby: The which?

The Court: The evidence in the case, those statements that you put in this morning?

Mr. Colby: Yes. That there are a thousand men employed, and also that 12,000 tons a day is the normal output and employment.

The Court: Thank you very much. Anything further of this witness?

Mr. Edises: Just one question, your Honor.

Recross Examination

Mr. Edises: Q. Before you instituted the so-called daily overtime plan, overtime meant time worked over and above eight hours, did it not?

A. Before we——

(Testimony of Joseph A. Williams.)

Q. Before you put the so-called——

A. Immediately before that we worked under the 44-hour week, and we paid overtime at the end of the week, the four hours overtime, you see on that last day. The only time a man would get the other overtime [230] would be if he worked over eight hours in one day.

Q. So that looking at it from a daily standpoint, the regular shift was eight hours? A. Yes.

Q. And overtime meant any time worked over eight hours, is that correct? A. Yes.

Q. And then you instituted the——

Mr. Colby: No, no, that is not correct.

Mr. Edises: Now, I submit that this witness is testifying.

Mr. Colby: Let us have the question again.

The Court: If counsel can correct the witness, of course he should.

Mr. Colby: The witness said he was talking about daily overtime under the last law.

The Witness: Yes, I was.

Mr. Edises: Will you read the question, please?

The Court: Read it.

(The reporter read the question.)

The Court: And the answer is what?

(The reporter read the answer.)

The Court: Any other questions?

Mr. Edises: Yes.

Q. Then you instituted the daily overtime system. The regular shift remained at eight hours, did it not? A. Yes.

(Testimony of Joseph A. Williams.)

Q. But you arbitrarily called the last hour and later the last hour and a fraction overtime hours, did you not? A. Yes. [231]

Mr. Colby: I object to the word "arbitrary."

The Court: Yes. I was wondering where you got that.

Mr. Colby: Because that was agreed to by the union.

The Court: Well, is it in the contract?

Mr. Colby: And in fact, it was on the insistence of the union, so there was nothing arbitrary about it.

The Court: If it was done at the request or behest of the union, or if it was covered by the contract, of course it wouldn't be arbitrary.

Mr. Edises: I will withdraw it. It was a matter of contract. We concede that, your Honor.

The Court: All right.

Mr. Colby: The contract was to be considered read in the record. The contract, itself, says it was done at the behest of the men.

Mr. Edises: We understand that.

The Court: Yes.

Mr. Edises: Q. Mr. Williams, have you some means here by records in your possession here or by consultation, perhaps, with some of your associates, of determining the kind of jobs held by Lynn Pope and Stanley Eneberg?

A. No, I don't think we would.

Mr. Edises: No other questions.

The Court: Is that all, Mr. Colby?

Mr. Colby: Well, I think there was some mixup

(Testimony of Joseph A. Williams.)

here on the [232] question of overtime. My associate here and Mr. Faulkner both think that the record does not state the thing clearly.

Further Redirect Examination

Mr. Colby: Q. The overtime that you were asked about for eight hours, that was under the Alaska law, wasn't it?

A. That is what I understood it to be.

Q. And then any overtime that might come up under this Fair Labor Standards Act would be after that first change took place—would be on a weekly basis? A. That is right.

The Court: Well, does that mean something in addition?

Mr. Colby: Q. How would that differ from the Alaska overtime?

The Court: What?

Mr. Colby: I asked him how would that differ from the Alaska overtime, the Territorial overtime?

A. On the last day of the week, for instance, when it was a 44-hour week, that man would get four hours overtime on that last day, and if he worked an hour longer, worked nine hours that day, he would get time and a half for that ninth hour, so that would make five hours overtime on that particular day.

The Court: Applying what, the Alaskan law?

The Witness: And the Wage-Hour law.

The Court: Apply both?

The Witness: Both, yes.

(Testimony of Joseph A. Williams.)

The Court: Does that cover it, Mr. Colby? [233]

Mr. Colby: I think so.

Q. And then on the weekly basis the overtime would only commence to be calculated after the statutory period had been worked, is that correct?

A. I just explained the weekly basis, Mr. Colby.

Mr. Colby: I see, all right.

The Court: You what?

The Witness: That explanation I gave was for the payment of overtime on the weekly base.

The Court: I see.

Mr. Colby: If the Court does not object, I will ask Mr. Faulkner.

The Court: Yes, if you can throw any light on it, Mr. Faulkner.

Mr. Faulkner: The way the Territorial law of Alaska provides, you have to pay time and a half for underground workers for each day where they worked more than eight hours. The Fair Labor Standards Act provides to pay them time and a half for every hour worked over forty in a week.

Mr. Colby: Or the earlier rates.

Mr. Faulkner: Forty-four when the Act went into effect. If a man worked when the wage-hour standard was 44 hours a week under Federal law, if he worked five hours overtime, as Mr. Williams stated, on Saturday, the end of the week, he would get his 5 hours over the 44 at time and a half under the Fair [234] Labor Standards Act. Then he would get time and a half again on the last hour under the Alaska Act, so he would really be getting

(Testimony of Joseph A. Williams.)

time and a half for six hours when he works four or when he works five, rather. Do you understand it, Judge?

The Court: No, but when it is on paper I will read it and think about it.

Mr. Faulkner: He gets an additional time and a half under the Alaska law for that extra hour worked, and also gets time and a half under the Fair Labor Standards Act, so he gets double time and a half for that one hour.

The Court: Applying the Alaska law and the Federal law, he is getting an increase altogether, Is that right?

Mr. Williams: That's right.

The Court: That is what it amounts to, isn't it?

Mr. Colby: Yes.

The Court: In attempting to cover both laws, the Alaskan statute and also the Federal law, you have allowed sufficient increase in wages to cover both laws. Am I stating that correctly?

Mr. Williams: Yes, that's right.

The Court: And that wage is as you have stated. What is the average wage allowed miners per day?

The Witness: Well, it has gradually been increased through the years, and for the underground men, when we shut down, it probably averaged around nine or ten dollars. [235]

The Court: A day?

The Witness: A day.

The Court: That is an eight-hour day?

(Testimony of Joseph A. Williams.)

The Witness: Yes, that would be for the underground men.

The Court: Yes.

The Witness: The wages on the surface are less.

The Court: How much less?

The Witness: Well, they would probably be a dollar or so less a day.

The Court: And what is the average weekly wage of those miners, let us say, underground, first?

The Witness: Oh, it would be fifty—between $50 and $60 a week.

The Court: And surface miners?

The Witness: Would be about — the surface man would be around $40 or $45.

The Court: Yes. Is that all, gentlemen?

Mr. Edises: Just one other question.

Further Recross-Examination

Mr. Edises: Q. There is no Territorial overtime law applicable to surface workers, is that correct?

A. We paid our surface men overtime for all hours worked over eight hours.

The Court: That is not the question. Read the question.

(The reporter read the question.) [236]

A. I don't know.

The Court: But you say you did pay them overtime?

The Witness: Yes.

(Testimony of Joseph A. Williams.)

The Court: The same as the others?

The Witness: Yes.

Mr. Edises: Q. What was the basis of overtime paid as to surface men?

A. Rate and a half.

Q. Was that prior to the Fair Labor Standards Act coming into effect? A. Yes.

Q. Rate and a half for what period of time?

A. For all hours worked over eight hours.

Q. But not on a weekly basis?

A. On a daily basis.

Q. On a daily basis? A. Yes.

Q. In other words, if a man worked fifty-six hours a week, eight hours a day, he got no overtime? A. That would be right.

Q. Under the Alaska law, that was also true of underground workers, is that not correct?

A. That's right.

Mr. Edises: That is all.

Mr. Colby: That is all.

I think that concludes our testimony.

The Court: Yes.

Mr. Colby: I might add, if your Honor please, there was a suggestion made here that your Honor did not want to be bothered with a lot of accounting. Of course, there will be no accounting phase unless your Honor finds for the plaintiffs, which we trust [237] will not be the case, but in the extreme event that that should take place——

The Court: We will take care of that later.

Mr. Colby: Yes, that is what is ordinarily done.

There are some figures here that they have put in, and in their complaint they have not backed it up with any evidence that I know of in which they differ in the conclusions they come to from the conclusions that our auditor comes to, and independently of the fact that they did not take into account these payments under this consent decree, and it is to iron those out—they are not very substantial. I think we can iron those out if it should come to that pass.

The Court: I should think you could do that in your briefs.

Mr. Colby: You would not want a brief filled with figures, I am sure.

The Court: No, but there ought not to be a lot of figures. If it is a matter of calculation——

Mr. Colby: As a matter of fact, I would have to send up to Alaska. I am handicapped in that respect, because this auditor who is down here for us alone and with whom I went over these accounts, had to go back to Alaska. He was the only man they could leave in charge of the mine, because it is closed down and they are short of men. He had to stay there. Otherwise we would have brought him down, but I don't thing there will be any difference, if it should come to that pass. [238]

Mr. Edises: Your Honor, I think if the principles are settled, there will be no problem about working out the details of the calculation.

The Court: Are you through, Counsel?

Mr. Edises: I have a short matter in rebuttal, your Honor.

The Court: How much time will it take? I have to leave here shortly.

Mr. Edises: It won't take over five minutes.

The Court: If you can't finish today we will go on Tuesday.

BERTRAM EDISES,

called as a witness on behalf of plaintiffs; sworn.

The Court: I don't want to rush you but I say to you that if we can't finish today we will go on Tuesday, but if we can get through with the testimony today——

Mr. Edises: I think we can, your Honor.

The Clerk: Your name is Bertram Edises?

The Witness: My name is Bertram Edises. I am a member of the firm of Gladstein, Grossman, Sawyer and Edises, Attorneys for Plaintiffs. In the motion, or, rather, affidavit of J. A. Williams, filed by defendants, reference is made to Sam Dapcevich, Marko Dapcevich, Mark J. Storms, and Roy H. Banta. The general effect of the affidavit is to indicate or cast a doubt upon the question of whether these men authorized the suit in this case. On May 8, 1943 our office sent a letter to the various [239] plaintiffs——

Mr. Colby: In order to shorten time, we will waive that objection. This is really in the motion made and not in the case, itself.

(Testimony of Bertram Edises.)

Mr. Edises: Well, there was—if you will waive the objection——

Mr. Colby: We will waive any objection to the fact that they did not concur in the joining in.

Mr. Edises: That leaves only the question of Sam Dapcevich, concerning whom there was testimony by Mr. Williams. I am prepared to show an exchange of correspondence with this Mr. Sam Dapcevich which shows that he knows very well what the issues of the case were, the specific authorization of us, and setting forth data necessary to the prosecution of the case.

Mr. Colby: We will accept your statement of that.

The Court: Anything further?

Mr. Edises: Counsel has just stated he will accept my statement as testimony.

Mr. Colby: I won't accept it as testimony. I will accept the fact that he would testify to that fact.

Mr. Edises: I will have to go further and offer the material in question.

Mr. Colby: I will accept your statement, so far as Dapcevich is concerned. We will make no objection to his being included. [240]

Mr. Edises: Thank you.

The Plaintiffs rest, your Honor.

The Court: Now, we have then submitted first the application which has been made to amend. Now, the other questions, I suppose, will be briefed?

Mr. Edises: Unless your Honor might feel that

a short oral discussion might clarify some of the issues.

The Court: Don't you think it would be better for me to let me have your briefs first?

Mr. Edises: Perhaps so.

The Court: Before coming on the bench today I had no opportunity to read and fully understand the pleadings, and much of it passed out of my mind. In glancing hastily at the record last night I was surprised to see I had made one ruling I had forgotten all about, so if you permit me to take the pleadings and study them and have your briefs, have the aid of your briefs before me, I think it would help me.

Mr. Colby: I think that is desirable. Then if you want any points cleared up——

The Court: Yes, after I have read those briefs, if I want to have argument, I will let you know.

Mr. Edises: Very well.

The Court: Now, we have first the matter of the application to amend the pleadings and make these forty persons who have been mentioned parties. That is one, and then the other issues, [241] I don't know how to specify. Gentlemen, what are they, the other issues in the case? What are the other issues in the case?

Mr. Edises: Well, one issue I suppose would be the legality of the daily overtime plan.

The Court: Yes.

Mr. Edises: Or the mode of determining the regular rate of pay.

Two, I suppose, would be the question of whether

there was any estoppel against these plaintiffs by virtue of the facts brought out by the defendants. I don't know whether defendants are insisting upon their interstate commerce objection. We introduced in evidence the compilations furnished by them, and in addition with respect to the interstate commerce operations of the individual employees, the answer forecloses any objection on that score. In addition, we bolstered that by testimony with respect to all except two of the employees.

The Court: I would like to have you agree upon what the issues are.

Mr. Colby: I will add to that, your Honor, and simplify the matter, perhaps, on this first defense, that is, that the company is engaged in mining gold as a primary business, and is therefore not in interstate commerce within the meaning of the act. I fully appreciate that the authority now is very heavy against us, but I will reserve the point, because it has [242] not been finally decided by the Supreme Court of the United States.

The Court: Very well.

Mr. Colby: Counsel may have the benefit of that attitude on my part, and I will not argue it extensively, except to cite whatever cases there are. As counsel has stated, the main issue is whether in going to this split day plan at the insistence of the union we were violating the Fair Labor Standards Act, and if the company is obliged to pay any balance that might be due over and above what was already paid under the consent decree. That, of course, is the major issue.

The Court: Yes.

Mr. Colby: And then we have set forth in another defense the fact that the men are estopped from claiming this, because of the various situations that have arisen.

The Court: I think, then, you are in accord on the issues that will be briefed. Now, how much time do you want? I suppose, Mr. Edises, you will take the opening here. How much time will you want?

Mr. Edises: Might we have three weeks, your Honor?

The Court: Yes, if you want it, I will let you have it.

Mr. Colby: That is for the opening. Is that from the time you get your transcript?

Mr. Edises: Well, yes, I think I should like to have it from the time we get the transcript. [243]

The Court: Well, that is a long time, Counsel.

Mr. Edises: Well, make it two weeks from the time you get the transcript.

The Court: Very well, two weeks from the time you get the transcript. And then you want how much time?

Mr. Colby: I will want two weeks.

The Court: And then you want a week to reply.

Mr. Edises: A week.

The Court: Miss Williams—I see Miss Williams here, and Miss Williams is the attorney for the——

Miss Williams: Wage and Hour Division.

The Court: I don't know your title, Miss Williams.

Miss Williams: Regional Attorney for the United States Department of Labor.

The Court: And she has entered into the stipulation in action 21834-S, to which my attention has been called, and which I think has some bearing on this case, so would you want to——

Miss Williams: Your Honor, I was about to ask when counsel finished if the Court would allow the Administrator of the Wage & Hour Division to file a brief amicus curiae. It is customary for the Administrator to do that in such cases. Particularly, he is interested in this case because of the fact that the stipulation was entered in the case brought by the Administrator. [244]

The Court: When would you file your brief?

Miss Williams: Well, at the same time that the first brief is due, your Honor, or, rather, I would like three weeks. We won't require a transcript, so three weeks from today would be satisfactory to the Court and the parties, and we would have ours in by then.

The Court: Very well, very well. Let that be the order then. As I understand it, you are not waiting on Mr. Edises' brief at all?

Miss Williams: Oh, no.

The Court: You are not waiting on the brief from either counsel. You will file your brief three weeks from today.

Miss Williams: Yes, your Honor, and serve it on both parties.

The Court: Yes.

Mr. Edises: I take it that counsel will furnish us with a copy of the exhibits that we have not been supplied with, at the earliest possible moment.

Mr. Colby: Yes, of course.

Mr. Edises: And I will do likewise with my own exhibits.

Mr. Colby: I think there is only one, isn't there, that you haven't had? That is the '41 contract?

Mr. Edises: The '41 contract, and a couple of letters, the Baird Snyder letter.

Mr. Colby: That we didn't introduce. [245]

Mr. Faulkner: We have a copy of it.

Mr. Edises: This Baird Snyder letter was one of the letters.

The Court: Have you a copy of it, Mr. Colby?

Mr. Colby: I have a copy somewhere.

The Court: Well, see that Mr. Edises gets a copy of that. That will settle it. The other one is this contract which has been mentioned, which was not completely signed.

Mr. Colby: We will get the original down and make exact copies of it and give one to Mr. Edises.

The Court: Very well.

Mr. Edises: May we have leave to withdraw the authorizations for purposes of copying them for counsel?

The Court: Yes, there is no objection on my part.

Mr. Colby: My associate has called attention to the fact that the Snyder letter is not in evidence.

Will you consent to its being put in, and I will serve you with a copy?

Mr. Edises: Yes.

Mr. Colby: That will be the next in order.

(The Baird Snyder letter referred to and which is to be produced will be Defendants' Exhibit J in evidence.)

DEFENDANTS' EXHIBIT J

U. S. Department of Labor
Wage and Hour Division
Washington

July 12, 1940

Mr. Robert S. Palmer
Secretary
Colorado Mining Association
Denver, Colorado

Dear Mr. Palmer:

This memorandum is to make a matter of record and to give the status of an administrative ruling to those things which I told you this morning about metal miners in Colorado. It applies equally to any kind of miners anywhere.

The provisions of the Fair Labor Standards Act apply to the individual worker and the circumstances and conditions of his individual employment. Therefore, where an individual worker in any work week works less than 42 hours, provided that you pay him 30c an hour or more there is no limit to the amount you can pay him in any such work week.

When an employee works over 42 hours a week, he must be paid during that work-week one and one-half times his regular rate of pay. The employee's regular rate of pay during that week is obtained by dividing into the total amount which you paid him the total number of hours he worked. Time and one-half must be paid on this regular hourly rate of pay for all hours worked in this week over 42.

You presented two problems, the first of which was a matter of keeping records which the Act will require any employer of miners to keep if he is producing goods for interstate commerce. There is no way around this requirement, and we have recently obtained injunctions on this count only.

The second problem you presented was the payment of overtime. I told you that our regulations on the payment of overtime had been made flexible, although such flexibility has not yet been made official, to permit three methods of payment for overtime:

1. Pay it in cash at the end of the week in which it accrued.

2. Pay it in time off within the pay period, not to exceed one month, such time off to be given either preceding or following the week in which the overtime occurred. See paragraph 18 of Interpretative Bulletin No. 4.

3. Pay it by any unit of time during the week daily, that is, by the shift, by the day, or whatever daily unit of time you elect, and to add up all the overtime so paid, which you can then apply at

the end of the week to the total overtime due for the week. See paragraph 19 of Interpretative Bulletin No. 4.

There is one thing about which we can have no misunderstanding, and that is that by a regular rate of pay we mean the same sum of money for the same unit of time. We use the hour because it is the common unit of time for the payment of labor. Nevertheless, regardless of what unit of time we were to permit you to use, the same sum of money must always be paid for the same unit to produce a regular rate of pay.

This means that you cannot establish in varying weeks different regular rates of pay as you may elect for the basis of payment of overtime. The rate of pay in any given week which must be the basis for the payment of overtime is the number of hours worked in that week divided into the number of dollars paid that week. See paragraphs 16 and 17 of Interpretative Bulletin No. 4.

In the matter of reducing wages, you are advised that a reduction of wages which is made because of the provisions of the Fair Labor Standards Act is a violation of Section 18 of the Act.

However, the establishment of a fictitious regular rate of pay for the payment of overtime is a violation of Section 7 of the Act, and may be a falsification of records.

A reduction in the regular rate of pay made for economic reasons is not a violation of the Act in any respect, but such reduction must result in a true hourly rate as described above.

For instance, if you have been paying customarily $4.00 for a shift of eight hours, with a customary work-week of six days, of 48 hours, the weekly salary which you have been paying is $24.00. In this week, however, there were six overtime hours.

For these six overtime hours, since the rate of pay this week was $24.00 divided by 48 hours, you should have paid one-half times 50c, the quotient of the above division. If you did not pay $25.50 you are in violation of Section 7 of the Act.

Now, if your mine sudenly becomes marginal through the ore pinching out or going into a lower grade, and you conclude that you must reduce wages so that you will be working 48 hours and paying but $24.00, you may make a new agreement of employment with your employees by reducing the hourly rate of 50c to approximately 48.5c, which regular rate of pay times 42 hours, plus six hours times one and one-half times 48.5c, will equal $24.00. But, the principal point to remember is that you have to pay at this rate; that you cannot put this rate down in your rate column and various different weekly hours in yours hours column and multiply them together and get $24.00. Only for 48 hours will the regular rate of pay of 48.5c yield the total sum of $24.00.

This reduction is justified where the price of gold or silver or other metal is fixed by the government and the ore yield is such as to require no increase in labor cost. It is further premised on the inability to get additional labor because of the geographic location of the mine.

Therefore, you either have to continue to pay this rate, and as the hours in your work-week fluctuate pay a total sum of more or less than $24.00, or you have to pay $24.00 and every week divide it by the number of hours in that work-week to find the rate on which you must pay time and one-half for hours in excess of 42.

I repeat that under any circumstances you have to keep records of your hours and wages to know what you are doing and so that we can tell what you are doing.

Sincerely yours,
/s/ BAIRD SNYDER
Depnty Administrator

Receipt of a copy of the foregoing admitted this 13th day of January, 1945.

GLADSTEIN, GROSSMAN,
SAWYER & EDISES
By BERTRAM EDISES

The Court: Have you a copy of it now?

Mr. Colby: No, your Honor. It has got mixed up with my papers.

The Court: Very well.

Mr. Edises: That is all.

[Endorsed]: Filed Feb. 15, 1946. [246]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 246 pages, numbered from 1 to 246, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of E. E. Robertson, et al., Plaintiffs, vs. Alaska Juneau Gold Mining Company, et al., No. 22658-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $16.75 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 18th day of February A. D. 1946.

[Seal] C. W. CALBREATH,
Clerk

/s/ By M. E. VAN BUREN
Deputy Clerk [247]

[Endorsed]: No. 11255. United States Circuit Court of Appeals for the Ninth Circuit. E. E. Robertson, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated, Appellants, vs. Alaska Juneau Gold Mining Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 18, 1946.

/s/ PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11255

E. E. ROBERTSON, et al.,

Appellants,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a corporation,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Appellants, pursuant to Division 6 of Rule 19 of the Rules of this Court, state that the following are the points on which they intend to rely on this appeal.

I.

The Court below erred in holding that the hourly rates of pay specified in the wage agreements of October 5, 1939, and May 1, 1940, between appellee and Juneau Mine & Mill Workers' Union (Local 263) were appellee's "regular" and "overtime" rates within the meaning of Section 7 (a) of the Fair Labor Standards Act.

II.

The Court below erred in holding that the portions of the 8-hour work day designated in said agreements as "overtime hours" were actually and in fact "overtime hours" as contemplated by the Fair Labor Standards Act.

III.

The Court below erred in holding that appellee's dealings with appellants and the method of computing and paying wages under said wage agreements were lawful and valid and did not constitute a violation of the Fair Labor Standards Act.

IV.

The Court below erred in holding that appellee has paid appellants and each of them all sums due them and each of them under the provisions of the Fair Labor Standards Act, and that there is not now due appellants or any of them any sum or sums by reason of said Act.

V.

The Court below erred in rendering judgment in favor of appellee.

VI.

In support of the foregoing points the entire record on appeal should be before the Court and therefore appellants request that the entire transcript of such record be printed.

Dated this 20th day of February, 1946.

GLADSTEIN, ANDERSON, RESNER, SAWYER & EDISES,

By /s/ EWING SIBBETT

Attorneys for Appellants.

(Acknowledgment of Service attached.)

[Endorsed]: Filed February 20, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

FURTHER ORDER DISPENSING WITH REPRODUCTION OF EXHIBITS

Good cause therefor appearing, It Is Ordered that the following exhibits and parts thereof, heretofore designated as parts of the record necessary for consideration of the points on which appellants rely on this appeal, need not be reproduced in the printed transcript of record, but will be considered by the Court in their original form:

Exhibits Nos. 1, 3-A to 3-R inclusive, 4, A, B-1, B-2, B-3, E, F, G, and H.

Dated this 20th day of February, 1946.

/s/ FRANCIS A. GARRECHT,

Senior United States Circuit Judge

[Endorsed]: Filed February 21, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

SUPPLEMENTAL DESIGNATION OF PORTIONS OF RECORD ON APPEAL TO BE OMITTED FROM PRINTED TRANSCRIPT

It Is Hereby Stipulated by and between counsel for appellants and appellee that the following portions of the certified record on appeal shall be omitted from the printed transcript:

1. Petition for Removal of Cause to Federal Court—pages 5 to 9, inclusive, of record.

2. Motion to Dismiss and for More Definite Statement—pages 12 to 17, inclusive, of record.

3. Schedules 2 to 17, inclusive, attached to First Amended Complaint—pages 31 to 61, inclusive, of record. In this connection it is hereby stipulated by and between counsel for the respective parties hereto that said omitted schedules are in the same general form as Schedule 1 attached to said First Amended Complaint, the only difference being the names of the employees involved and the dates of work, overtime hours worked, hourly rates and amounts alleged to be due the said employees.

4. Notice of Motion to Amend First Amended Complaint, as amended, and Notice—pages 81 to 84, inclusive, of record.

5. Reply to Motion to Amend First Amended Complaint, as amended,—pages 85 and 90, inclusive, of record.

6. The following portion of the Reporter's Transcript of the trial: Commencing with line 4 of page 133 and continuing to and including line 8 of page 144, of the record.

Dated this 28th day of February, 1946.

GLADSTEIN, ANDERSON,
RESNER, SAWYER &
EDISES

/s/ By EWING SIBBETT
Attorneys for Appellants

/s/ WM. E. COLBY, GEO. W.
WILSON
Attorneys for Appellee.

(Acknowledgment of Service attached.)

[Endorsed]: Filed March 2, 1946. Paul P. O'Brien, Clerk.

No. 11255

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Appellants,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Friday, October 25, 1946.

Before: Denman, Healy and Orr,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Bertram Edises, counsel for appellants, and by Mr. Wm. E. Colby, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Tuesday, November 5, 1946.

Before: Denham, Healy and Orr,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11,255

Nov. 5, 1946

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Appellants,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before: Denman, Healy and Orr,
Circuit Judges. Orr, Circuit Judge:

Appellee, Alaska Juneau Gold Mining Company, hereinafter called the Company, for many years has carried on a large scale low-grade gold mining operation in Alaska. The recovery from all metals contained in the ore mined varied between 90 and 95 cents per ton. To operate profitably with such

low-grade ore required the handling of a large tonnage each day and that costs be kept at a minimum.

Prior to the adoption of the Fair Labor Standards Act the regular work day consisted of eight-hour shifts. After the adoption of said Act the Company put in operation a plan similar to that approved in the case of Walling v. Belo Corporationtion, 316 U. S. 624, and continued the normal shift at eight hours.

In October, 1939, as a result of demands by the certified labor union representing the employees, a new wage agreement incorporating the so-called "split day" plan was signed by the Company and the union. Under this plan the men continued to work a regular eight-hour daily shift, but the first seven of these hours were designated as "straight time" and the last hour of each day as "overtime". The "straight" or "regular" hourly rate of pay was reduced and for the one hour of daily "overtime" a rate equal to 150% of the new hourly rate was paid, with the result that appellants' daily wage for the eight-hour shift remained substantially the same as it had been prior to the effective date of the Act.

In May, 1940, mindful of the provisions of an Act reducing the total work week to 40 hours effective in October, 1940, the Company and the union entered into a new contract under which the split day plan was continued. However, due to the fact that the total regular work week under the Act would be 40 hours in October, the split was now

6.6 hours of "regular" time and 1.4 hours of "overtime" each day. The "regular" rate paid for the first 6.6 hours in each day was again reduced so that the total daily wage remained substantially the same.

On December 13, 1940, the Wage and Hour Administration notified the Company that, in the Government's opinion, the split day plan violated the Act, and on May 1, 1941, faced with the threat of a suit against it by the Administrator in West Virginia, the state of its incorporation, the Company discontinued the split day plan, and a consent decree was, by stipulation, entered against it in the District Court. The Company, according to the terms of the stipulation, paid the employees the extra wages due[1] from December 13, 1940 (the date the Wage and Hour Administration notified the Company it considered the plan illegal) to May 1, 1941, (the date the split day plan was discontinued).

The present suit was begun on April 23, 1943, by appellants to recover unpaid wages and liquidated damages during the time the split day plan was in force, from April 23, 1940[2] to May 1, 1941, less the

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[1]The Company continued to deny liability and entered into the stipulation only to settle the Government's claim against it.

[2]The original complaint, asking unpaid wages and overtime from October, 1938, was dismissed by the District Court on the ground that any right to recover unpaid sums under the Act in excess of three years next preceding the commencement of the action was barred by § 338(1), California Code of Civil Procedure.

amounts already paid, pursuant to the consent decree, covering the period from December 13, 1940, to May 1, 1941.

The District Court held that the split day plans of wage computation and payment were valid and did not constitute a violation of the Fair Labor Standards Act, and entered judgment for the Company.

Since the District Court's decision we have declared a split day plan virtually identical to the plan involved here to be a violation of the Act.[3]

Here, as in the Alaska Pacific case, (see note 3) the Company's split day plan did not base the regular rate "upon the wages received, nor upon the hours actually spent in the normal non-overtime week, nor was the regular rate paid for the first forty hours actually worked." (152 F. 2d, 814).

Under the October, 1939, contract the first seven hours of a day were called "regular" or "straight" time and the last hour was called "overtime", and under the May, 1940, plan, the split was 6.6 "regular" and 1.6 "overtime." But the regular shift of the regular, normal work day, both before and after the passage of the Act, and during the effective dates of both split day plans under consideration here, was eight hours. It is noteworthy that the May, 1940, contract specifically provides "for the

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[3]Walling v. Alaska Pacific Consolidated Mining Co., 152 F. 2d, 812; CCA 9, cert. den. 66 S.C. 960; Walling v. Helmrich & Payne, Inc., 323 U.S. 37.

mine a regular shift shall consist of eight hours * * *".

Therefore, since the normal work day consisted of eight hours, we must look "not to contract nomenclature" but to all wages normally received for a normal work day to determine the statutory regular rate.[4]

Such is the method adopted by the Supreme Court to determine the regular rate in the Helmerich case, supra:

"To compute this regular rate * * * required only the simple process of dividing the wages received for each tour [shift] by the number of hours in that tour [shift]. This regular rate was then applicable to the first 40 hours regularly worked on the tours [shifts] and the overtime rate (150% of the regular rate) became effective as to all hours worked in excess of 40." 323 U.S. 37, 40-41.

Thus, if one of appellants received $8 for each 8-hour shift, his regular rate would be computed by dividing $8 by 8 hours. This regular rate of $1 per hour must then be paid for the first 40 hours normally and regularly worked, and for all hours in addition to this first 40 he must be paid at the rate of $1.50 per hour.

The vice in all these split day plans is that their so-called "regular" rate is not based on payments regularly made each week for the normal work week and, consequently, their "overtime" rate is

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[4]See Note 3.

not compensation for true overtime, that is, hours worked in excess of the normal work week or work day.

Here, the seven-hour "regular" day, as designated in the split day contract, was an arbitrary, artificial label. The regular, normal work day had always been eight hours prior to the Act, and it remained so afterwards. Consequently, since "parties have decided upon the amount of wages and mode of payment, the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." Walling v. Youngerman Reynolds Hardware Co., 325 U.S. 419, 424-5.

It cannot change the result to say, as the Company does, that the split day plan was not artificial because, under the "7-1 split," if for some reason an employee worked only five hours one day he would be paid only at the "regular" rate for those five hours. The illegality of the plan does not lie in the fact that the Company did not pay the rate designated in its contracts as the "regular rate," but rather in the fact that that contract-designated "regular" rate was not in fact the hourly rate at which men were paid for the normal, regular work day. The contract-designated "regular" rate is artificial in the sense that it is devised so that, when added to the contract-designated "overtime" rate for a certain number of contract-designated "overtime" hours, it will result in maintaining the em-

ployee's total compensation at substantially the same level as his pre-Fair Labor Standards Act compensation.

The Act does not necessarily require an increase of wages, nor does it forbid a decrease, so long as the wages paid are above the statutory minimum. But it does require that all "wages * * * or things of value forming part of the normal weekly income" be used to determine the regular rate, and that "that regular rate should then be applied to the first 40 hours worked, and for all hours worked in addition a rate one and one-half times the regular rate must be paid."[5]

Nor can it make this split day plan legal under the Act to argue that the plan was adopted in this case only because the employees demanded its adoption. The plan is virtually identical to the plans condemned in Walling v. Helmerich & Payne, 323 U.S. 37, and Walling v. Alaska Pacific Consol. Min. Co., 152 F. 2d, 812, CCA 9, cert. den. 66 S.Ct. 960, and that which is illegal cannot be made legal by contract of the parties.

The purpose of the Fair Labor Standards Act is to spread employment and to reduce working hours. The split shift plan does not further the attaining of either of these objectives.

The Company further contends that appellants are equitably estopped to sue for additional wages and liquidated damages since they forced the Com-

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[5]See Note 3.

pany to abandon a legal plan and adopt a split day plan.

Plausible as that argument may appear we are still confronted with the fact that the Act sets certain standards for the determination of compensation which must be met regardless of whether or not the employees are at fault in forcing an invalid plan upon an unwilling employer.

"Any custom or contract falling short of that basic policy [of guaranteeing compensation for all work or employment engaged in by employees covered by the Fair Labor Standards Act], like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602-3.

An express agreement to work for less than the basic minimum statutory rates is invalid,[6] and a release given an employer by an employee freeing the employer from further claims under the Fair Labor Standards Act, will not estop the employee from later recovering liquidated damages for unpaid wages and overtime, and attorney's fees under the Act[7] since the employees' rights under § 16(b) of the Act, although conferred on private persons, are statutory rights which affect the public interest and, hence, rights which may not be waived by an

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[6]Overnight Transportation Co. v. Missel, 316 U.S. 572.

[7]Brooklyn Bank v. O'Neil, 324 U.S. 697.

employee. Further, acceptance by an employee of payments of regular and overtime wages will not estop him from suing to recover the amount due him when he proves he actually worked longer.[8]

We think the employees' right to have their regular rate of compensation (and, consequently, their overtime rates) computed according to the method laid down by the Supreme Court in Walling v. Helmerich & Payne (see note 3), is also a right of this same "private-public character"[9] and, hence, is also a right which cannot be waived, and which the employee cannot be estopped to assert, even though, through his union, he has forced an unwilling employer to adopt the illegal plan.

"The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee. * * * But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. * * * Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40." Walling v. Helmerich & Payne, 323 U.S. 37, 42.

This computation of the regular and overtime

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[8]De Pasquale v. Williams-Bauer Corp., 151 F. 2d, 578, CCA, 2; cert. den. 66 S.Ct. 1007.

[9]See Note 7.

rates goes to the fundamentals of the Act, and is a basic part of the Congressional policy. The computation of regular and overtime rates must be considered in the same category as an employee's right to the statutory minimum wage.[10]

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

[Endorsed]: Opinion. Filed Nov. 5, 1946. Paul P. O'Brien, Clerk.

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[10]Cf. Lawley & Son Corp. v. South, 140 F. 2d, 439, CCA 1; cert. den. 322 U.S. 746; Walsh v. 515 Madison Avenue Corp., 42 N.Y.S. 2d, 262, aff'd. without opinion by Appellate Division, New York Supreme Court, 45 N.Y.S. 2d, 927, aff'd. without opinion by New York Court of Appeals, 59 N.E. 2d, 183.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 11255

E. E. ROBERTSON, etc., et al.,
Appellants,

vs.

ALASKA JUNEAU GOLD MINING CO.,
Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court, with costs in favor of the appellants, and against the appellee.

It Is Further Ordered and Adjudged by this Court that the appellants recover against the ap-

pellee for their costs herein expended, and have execution therefor.

Filed and entered November 5, 1946.

/s/ PAUL P. O'BRIEN,
Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Thursday, December 5, 1946.

Before: Denman, Healy and Orr,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellee, filed December 3, 1946, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred fifteen (215) pages, numbered from and including 1 to and including 215, to be a full, true and correct copy of the entire record, excluding certain original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 19th day of December, 1946.

[Seal] PAUL P. O'BRIEN,
Clerk.

Subject Index

	Page
Opinions Below	2
Jurisdiction	2
Federal Statute Involved	3
Statement of the Case	3
Questions Presented and Errors of the Circuit Court of Appeals Specified	8
Reasons Relied on for Allowance of Writ	9
There is no inherent vice in the split-day plan of wage payment	11
The Act does not require that the regular rate must be paid for the first 40 hours of the workweek	13
The Helmerich case decided by this court is distinguishable	15
Walling v. Alaska Pacific Cons. M. Co., 152 F. (2d) 812	17
The trial court's decision	19
If the decision of the Circuit Court of Appeals is not reversed the Krug-Lewis agreement must under that precedent be held also to violate the Act	19
The employees are estopped from claiming there was any violation of the Act	21

Table of Authorities Cited

Cases	Pages
Casey v. Galli, 94 U. S. 673	22
Calhoun v. Massie, 253 U. S. 170	24
Daniel v. Tearney, 102 U. S. 415	9, 10, 23
Dickerson v. Colgrove, 100 U. S. 578	22
Fort Worth Co. v. Smith-Bridge Co., 151 U. S. 294	23
Gilbert v. United States, 8 Wall. 358	22
Hill v. National Bank, 97 U. S. 450	22
Hine v. Morse, 218 U. S. 483	24
John L. Lewis v. United States, No. 782	10
Kinsman v. Parkhurst, 18 How. 289	23
Magee v. United States, 282 U. S. 432	23
Pierce v. Somerset Ry., 171 U. S. 641	24
Shepard v. Barron, 194 U. S. 553	24
Sprigg v. Bank, 10 Pet. 257	22
Storm v. United States, 94 U. S. 76	23
U. S. Gas Co. v. R.R. Comm., 278 U. S. 300	24
United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 303	23
United States v. John L. Lewis, No. 760	10
United States v. United Mine Workers of America, No. 759	10
United Mine Workers of America v. United States, No. 781	10
Van Rensselaer v. Kearney, 11 How. 296	22
Walling v. Alaska Pacific Cons. M. Co., 152 Fed. 2d 812	8
Walling v. Belo Corp., 313 U. S. 624	4
Walling v. Helmerich & Payne, 323 U. S. 37	8, 15

Statutes Pages

Fair Labor Standards Act of 1938:
52 Stat. 1060, 29 U.S.C.A. Section 201 3
52 Stat. 1060, 29 U.S.C. Section 207 3
52 Stat. 1060, 29 U.S.C. Section 210 .....11, 14

Texts

Pomeroy, "Equity Jurisprudence", 3rd ed., Vol. II, Section 804 21

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No.

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Respondents (Appellants below),

vs.

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Petitioner (Appellee below).

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause (R. 214) which reversed the judgment of the District Court of the United States for the Northern District of California, Southern Division (R. 59).

OPINIONS BELOW.

The opinion (R. 44-51) and findings of fact and conclusions of law (R. 69-79) of the District Court are not reported. The opinion of the Circuit Court of Appeals (R. 204-213) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered November 5, 1946 (R. 214) and rehearing was denied December 5, 1946 (R. 215). Jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. § 347). The decision below has decided important questions of federal law which have not been, but should be settled by this Court and it also "involves principles of far-reaching effect which have a direct bearing on the general walfare", as fully set forth hereinafter.

FEDERAL STATUTE INVOLVED.

Section 7(a) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. § 207) provides under the heading "*Maximum Hours*":

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date,
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed * * *"

STATEMENT OF THE CASE.

This is an action brought under the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C.A. Sec. 201 et seq.) by certain employees of petitioner to recover alleged unpaid wages and liquidated damages. Petitioner was operating a gold mine in Juneau, Alaska (R. 128, 138, 70), when the Act became effective in October, 1938, and was paying the best and highest wages of any hard rock mine anywhere (R. 140, 70). To meet the requirements of the Act it adopted a wage and hour system which this Court, in a

case presenting similar facts, held to be in compliance with the Act. That case held:

> "But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act."
>
> (*Walling v. Belo Corp.*, 313 U. S. 624, 630.)

The basic regular hour wages were reduced so that when added to the overtime pay the total wage received after the Act went into effect was slightly more than formerly (R. 141, 70). Because of the low grade of the ore, low costs were vital and any considerable increase in wages would have resulted in a total shut-down, which later happened in 1944 for this very reason (R. 140, 172, 70). Regular time was paid for the first 44 hours of the week and time and a half for all additional hours (R. 123, 70). Under this system the men who laid off a day or more during the week lost overtime because their weekly hour total dropped below 44 hours (R. 130, 143, 150, 71). Therefore, in October, 1939, after a year of this admittedly valid system of payment had continued, and when, under the terms of the Act the regular workweek was shortened from 44 to 42 hours, the men, through their union, having heard of a split-day plan of paying wages in Butte, Montana, demanded that for 6-day a week men the first seven hours of each day be treated as regular time and the eighth hour as overtime (R. 110, 130, 150-1, 71-2). For 7-day a week men the first six hours of each day were to be treated as regular time and the last two hours as overtime (R. 166-171, 72). By this plan, since all

employees were credited with overtime each day, the men who did not work for a day or more during the week would be paid these overtime wages for each day they did work (R. 130, 150, 72). Petitioner, with some reluctance, because of the increased cost, put this plan demanded by the men into operation. The revised agreement of October, 1939 (Ex. F and attached schedule), recites that the new wage schedule was "submitted to the company" by the Union, and was "computed upon the basis suggested by the Union." (R. 72.) The amount of wages due each employee was calculated by the bookkeeper bi-monthly for the previous half month. Therefore, after the new plan went into effect, the practical result was that after the week's work had all been done, instead of taking the first 42 hours of the week and treating it as all regular time and the remaining 6 hours at the end of the week as overtime, as petitioner had been doing under the prior "*Belo* case" plan, the bookkeeper distributed the same number of regular and overtime hours through the days of the week as the men had demanded should be done (R. 72). The men who worked full time were credited with 42 regular time hours per week paid for at the agreed upon hourly rate and 6 overtime hours (6) per week paid for at the overtime rate, and consequently received substantially the same pay that they would have received under the previous admittedly lawful plan.* The only men to whom the change in plan made any substantial difference were those who laid off a day or more during the week. These men benefited materially because they

*As a matter of fact they received a little increase in pay (R. 129, 151, 72).

received overtime pay for each day they worked, which additional pay they would not have received under the previous valid *Belo* plan of payment inaugurated by petitioner.

In May, 1940, five months before the 40 hour workweek became effective under the Act, petitioner entered into a new annual contract with its employees, giving them an additional five months advantage to enjoy the benefit of the 40-hour week (which under the Act did not become effective until October), and the schedule of hours was changed again so as to continue to meet the insistence of the men that overtime be credited daily instead of weekly. For 6-day men the first 6.6 hours of each day were treated as regular time and the last 1.4 hours as overtime. For 7-day men the first 5.7 hours of each day were treated as regular time and the last 2.3 hours overtime. The practical results were the same as under the previous schedule. Men who worked full time were credited with the number of hours of regular time and overtime that they would have been credited with if the earlier admittedly lawful Belo method of calculating wages had persisted.* The real difference was merely one of entering the hours on the books and crediting overtime each day of the week instead of lumping it all at the end of the week. The total weekly pay remained substantially the same, or was increased a little, for men working full time (R. 129, 151, 72-73). On the other hand, just as was the experience with the previous 42 hour workweek, men who laid off during the

*As a matter of fact petitioner again gave the men the slight advantage that resulted from using decimals instead of fractions in dividing the hours of the day into regular and overtime hours.

week received credit for and were paid daily overtime which they would not have received had the earlier admittedly lawful *Belo* case method of concentrating overtime at the end of the week prevailed.

The Wage-Hour Administrator meanwhile had claimed that any split-day plan was in violation of the Act (ignoring the benefit to the men who laid off during the week) and threatened to bring an action in West Virginia, the state of petitioner's corporate organization. To avoid the expense and hardship of transporting witnesses all the way from Alaska to West Virginia (witnesses vital to petitioner's operations in Alaska), petitioner stipulated to the entering of a consent decree in the federal court in San Francisco and abandoned the split-day method of calculating wages and on May 1, 1941, returned to the *Belo* case plan of wage payment. Petitioner at all times reserved all legal rights, insisting that the split-day plan agreements of October, 1939, and May, 1940, were not a violation of the Act (R. 124-128, 73-74, Exs. B., 2 and 3).

Respondents, appellants below, who were among the men who benefited by this change of plan, adopted solely because of their insistence, then brought this action to recover claimed overtime and liquidated damages under the Act (R. 2-24). The trial Court held that the split-day method of calculating wages did not violate any of the wage-hour provisions of the Act (R. Opinion, 44-51, Findings 69-78). The Circuit Court of Appeals decided in effect that all split-day plans of paying wages are a violation of the Act and that overtime hours must be relegated to the very last work hours of the week and also

held that the fact that the employees were solely responsible for the change from an admittedly valid plan to the split day plan, the validity of which is here in question, was no defense and reversed the trial Court (R. 204-213).

QUESTIONS PRESENTED AND ERRORS OF THE CIRCUIT COURT OF APPEALS SPECIFIED.

1. Did the Circuit Court of Appeals err in holding that the split-day method of paying wages, described in detail in the foregoing fact statement, is a violation of the Fair Labor Standards Act?

2. Did the Circuit Court of Appeals err in holding that regular rate pay must be applied to the first 40 hours of the workweek and that no overtime may be credited to the last hours of each day during the week but can only lawfully be applied to those hours at the end of the workweek which are in excess of 40 hours?

3. Did the Circuit Court of Appeals err in holding that where the employees were solely responsible for the adoption of the split-day plan of paying wages and benefited thereby at the expense of petitioner, nevertheless the employees are not equitably estopped from recovering additional wages and liquidated damages under the Act?

4. Did the Circuit Court of Appeals err in holding that the cases of *Walling v. Helmerich & Payne*, 323 U. S. 37, and *Walling v. Alaska Pacific Cons. M. Co.*, 152 Fed. 2d 812, are controlling precedents?

5. Did the Circuit Court of Appeals err in holding that the principle of equitable estoppel laid down in the case of *Daniels v. Tearney*, 102 U. S. 415, and similar cases decided by this Court to the effect that no one may be allowed "to profit by his own wrong", is not applicable in the instant case?

6. Did the Circuit Court of Appeals err in reversing the decision of the trial Court?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) Important questions of federal law involving the Fair Labor Standards Act are here involved which have not been and should be finally determined by this Court. These questions have been set forth in detail in the foregoing statement of "Questions Presented." The principal one is whether the split-day plan inaugurated in the instant case at the demand of the employees and for their express benefit is a violation of the Act.

(2) To allow the decision of the Appellate Court below to stand would mean that where the Act was already being complied with in every respect, the employees who are unfortunate enough to lose time during the week may not better their wage status so as to receive overtime compensation calculated on a daily basis. The wages of full time workers were not affected one iota by the change in plan. This petition seeks to give such employees as work only part time the financial advantage of having their overtime pay calculated daily instead of weekly, in which latter event there would be no overtime, and requests a final decision that such a plan of wage payment is lawful.

(3) This petition seeks to secure reaffirmance of this Court's ruling in *Daniels v. Tearney*, 102 U. S. 415 and many similar cases that under like circumstances no one may be permitted "to profit by his own wrong." The employees who worked part time profited by the split-day plan. May they now repudiate it, keep the profits received under their own plan, and additionally profit by what amount to penalties under the Act?

(4) This Court has pending before it four cases involving what is commonly referred to as the Krug-Lewis soft coal contract, dated May 29, 1946, and prior contracts which it incorporates, which contain split-day wage provisions identical in character with those here brought into question in the instant case. These cases are No. 759, *United States v. United Mine Workers of America;* No. 760, *United States v. John L. Lewis;* No. 781, *United Mine Workers of America v. United States;* and No. 782, *John L. Lewis v. United States.* The general public interest in the validity of the Krug-Lewis contract and the prior agreements which it incorporates and other contracts throughout the United States containing split-day clauses, justifies this Court in granting the writ here prayed for and in reversing the judgment of the Circuit Court of Appeals, thus avoiding the creation of a judicial precedent which, if followed, would result in the inevitable result that the Krug-Lewis and other similar wage-hour contracts would be held also to violate the Act in this same respect. It is of major national importance that this erroneous precedent should be corrected, as is more fully pointed out hereinafter.

THERE IS NO INHERENT VICE IN THE SPLIT-DAY PLAN OF WAGE PAYMENT.

The Appellate Court below in effect held that the "split-day" method of wage payment is *per se* a violation of the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C. §210 et seq.) and that under no conceivable circumstances can such a plan be valid. Petitioner inaugurated a new plan of wage payment when the Act went into effect in October, 1938. This Court in the *Belo* case (316 U. S. 624) held a similar plan to be valid.

In October, 1939, very reluctantly, because of the overtime wages which would have to be paid to those men who laid off during the week, and which were not payable under the Belo plan contract, petitioner yielded to the demand of the union and put in effect the union's split-day system of paying wages. Petitioner had been paying the 6-day men for a 48-hour week, 44 hours regular or "straight" time and the last 4 hours overtime (time and one half). Consequently, the men who laid off a day or more during the week through illness, or other reason, lost all overtime for that week. To remedy this, in October, 1939, the union's split-day plan was adopted, which, for 6 day a week men, treated the first 7 hours of each day as regular or "straight" time and the last hour of each of the six days as overtime.* By this split-day method of allocating

*In October, 1939, by the terms of the Act a work week of regular time was reduced from 44 to 42 hours. The Court of Appeals in its opinion states that "the 'straight' or 'regular' hourly rate of pay was reduced" (R. 205, 206) when the October, 1939, and May, 1940, wage agreements were entered into. This very slight adjustment because of dropping from 44 to 42 regular workweek hours in 1939, and again from 42 to 40 hours in 1940, as required by the Act, had nothing whatsoever to do with the inauguration of the union's split-day plan. A similar adjustment had already

wages the men were credited with one hour of overtime each day, and those men who lost a day during the week would still receive 5 hours overtime wages, even though they worked only 5 days. This overtime they would not have received under the previous admittedly valid plan. The men who worked full time received credit for the identical number of hours of regular time and overtime during the week under either plan, as is evidenced by the following table comparing the two plans:

Split-day calculation actually made for each day for a 6 day a week man			If calculation had been made weekly instead of daily, and hence lawful under the Belo case	
	Regular Rate	Overtime	Regular Rate	Overtime
Mon.	7	1	8	none
Tues.	7	1	8	none
Wednes.	7	1	8	none
Thurs.	7	1	8	none
Fri.	7	1	8	none
Sat.	7	1	2	6
	42 hours regular time	6 hours overtime	42 hours regular time	6 hours overtime

The same result was reached when, because of the provision in the Act, the regular hours per work week

been made in October, 1938, when the Act became effective, and the same adjustments in 1939 and 1940 would have been made in any event had the valid Belo plan of paying wages persisted. The Belo case held such adjustments, when agreed to by the employee, as was the case here, were in full compliance with the Act. As a matter of fact, the appellate court below was in error in making its statement as broad as it did. For example, in the case of Robertson, the principal plaintiff, representing the other plaintiffs, the records show that there was no reduction whatsoever in his "regular" hourly rate when the new May, 1940, wage agreement was made. His regular hourly rate remained identically the same as it was under the previous October, 1939, contract, namely 61 cents (Exs. F, G, and 3A).

were in October, 1940, dropped from 42 to 40. Petitioner gave the men the advantage of this 40 hour week, 5 months in advance, when on May 1, 1940, it entered into a new annual wage agreement. To continue to comply with the men's demand for a split day, the split day was changed to 6.6 regular hours and 1.4 overtime hours. Petitioner gave the men every advantage in making this change, as already noted in the STATEMENT OF FACTS. The men who worked full time were credited with the same total number of regular time and overtime hours and received the same wages or slightly more than they were receiving when the wages were paid under the previous plan held lawful in the *Belo* case (R. 73, 151, 157, 178).*

THE ACT DOES NOT REQUIRE THAT THE REGULAR RATE MUST BE PAID FOR THE FIRST 40 HOURS OF THE WORK-WEEK.

The decision of the Circuit Court of Appeals proceeds on the assumption that it is only the *first* 40 or 42 hours, as the case may be, which can lawfully be credited with "regular" or "straight" time (R. 208). The fact that during the workweek the employee is actually paid for 40 or 42 hours at regular time rates, though it may not be the first 40 or 42 hours, does not in its opinion afford

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*Counsel for respondents contended below that the change to the split day plan was a disadvantage to the men who worked full time because they would receive no overtime pay if they only worked the first half of the sixth day of the week and under the Belo plan they would receive overtime pay. This argument utterly ignores the fact that such full time men would, on the morning of the sixth day, already have received 5 overtime hours credit.

any mitigation. It must be the first 40 or 42 hours, even though the practical result as far as total of wages received is substantially the same, or slightly more, as was the case here. Such a conclusion is not logical. It shocks one's sense of justice and fair dealing.

The Act itself (52 Stat. 1060, 29 U.S.C. § 201, et seq.) does not so provide. Section 7(a), subdivisions 2 and 3 (§ 207) states that a work week shall not be "longer than" 42 or 40 hours.

> "unless such employee receives compensation for his employment *in excess of the hours above specified* at a rate not less than one and one-half times the regular rate at which he is employed." (Emphasis ours.)

In the instant case this italicized provision of the Act has been literally complied with.

Nowhere in the act is the phrase "the first" 40 hours found, nor is there any phraseology used from which this conclusion can be successfully reached. If it had been the intention of Congress to limit the hours of regular pay to the *first* 40 or 42 or 44 hours of the week, as the case may be, it would have been easy to have said so. While the Courts have frequently referred to the "first forty hours" in decisions involving the act, a careful analysis of those cases indicates that in none of them was it a vital consideration as to whether or not the *first* 40, 42 or 44 hours must be the only hours to receive "regular rate" pay.

The agreement of October 24, 1939 (Ex. F., p. 1) expressly provided for a 42-hour week of regular pay and all time "in excess of 42 hours per week" was to be con-

sidered as overtime. Similarly, the agreement of May 1, 1940 (Ex. A, Par. 8, Sub. a), expressly provided for payment of overtime for all hours in excess of 40. These provisions are in strict accordance with the requirements of the Act and were adhered to in making all wage payments.

THE HELMERICH CASE DECIDED BY THIS COURT IS DISTINGUISHABLE.

The Court of Appeals bases its decision on the case of *Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37 (R. 208). The split-day plan involved in that case was as extreme a perversion of wage calculation as can be conceived. According to the opinion in that case it was *imposed* on the employees who were forced to accept it whether they liked it or not. The day shift was divided 50-50 into "regular" hours and "overtime" hours. This resulted in its being an absolute impossibility for any employee to work 40 "regular time" hours in any one week. The rate called the "regular" rate was purely fictitious and bore no relationship to the rates actually paid. As this Court said, no real overtime was payable until 80 hours a week had been worked which would never occur in practice. How vastly different are those facts from the facts of the instant case where the split-day plan of calculating wages was inaugurated solely because the employees demanded that it be adopted, where 40 and 42 hours per week of regular time depending on the year, were worked regularly and paid for at the regular rate provided and time and a half paid for all overtime hours. There is nothing "artificial" or "arbitrary" about such a plan and it has no resem-

blance to the fictitious hours and wages of the *Helmerich* case.

As this Court said in the *Helmerich* case opinion:

> "Section 7(a) limits to 40 a week the number of hours that an employer may employ any of his employees subject to the Act, unless the employee receives compensation for his employment in excess of 40 hours at a rate 'not less than one and one-half times the regular rate at which he is employed'." (p. 39)

This requirement above expressed was complied with to the letter by petitioner. All hours in excess of 40 (or 42 depending on the year) were compensated for at a rate of one and one-half times the regular rate.

The opinion in the *Helmerich* case goes on to say:

> "The vice of respondent's* plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow compensation to be paid for true overtime hours." (p. 41)

In the instant case the contract regular rate was the rate which was actually paid for ordinary, non-overtime hours and compensation at the rate of time and one-half was actually paid for true overtime hours. This receives a practical demonstration from the fact that when a man worked only the first hours of any day, for example half a day, he only received pay at the regular time rate and received no overtime credit for that day. (Exs. 3F, G, 3K, 3M contain such examples.)

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*Another vital distinction is that in the Helmerich case the plan was the company's, whereas here it was the employees, and petitioner merely put in operation a split-day plan demanded by the men.

In the instant case the regular rate was established "in a bona fide manner" at the demand and insistence of the men themselves and was in no sense "unrealistic" and "artificial" and did not "negate the statutory purposes" as this Court has characterized the *Helmerich* plan (323 U. S. 42). Here the men were paid more than they would have received had the prior admittedly lawful Belo method of calculating wages been continued.

It is true that the *Helmerich* opinion states that nothing in the *Belo* decision "sanctions the use of the split-day plan" and it refers to "the applicability of the regular rate to the *first* (Emphasis ours) 40 hours actually and regularly worked" (323 U. S. 42), but we respectfully submit it was the distorted wage payment plan of that case which the Court had in mind and not a bona fide plan like the one here involved where the men actually profited by a change in plan brought about by their own insistence, and hence the language of that opinion should be limited to criticism of the wage agreement actually before it and others of like nature.

WALLING v. ALASKA PACIFIC CONS. M. CO., 152 F. (2d) 812.

The above entitled case decided by the same Appellate Court below is cited in support of its decision in the instant case. While not so extreme a case factually as the *Helmerich* case, it is based on the *Helmerich* decision. The facts of the *Alaska Pacific* case differentiate it from the instant case. In that case the split day plan was *imposed* on the employees who had no choice but had to accept it. That opinion states that the company,

> "did not base the regular rate upon the wages received, nor upon the hours actually spent in the normal non-overtime week * * *." (p. 814).

In the instant case, on the contrary, the regular rate was the rate the men demanded should be the regular rate and was the regular rate actually used in the computation of wages and was the rate actually applied to "the normal non-overtime week" of 40 (or 42 hours, as the case might be).

In the *Alaska Pacific* case the Court said:

> "An elaborate algebraic formula was devised in order to create the plan." (152 F. (2d) 813.)

Nothing of the sort took place here. The calculation of wages in the instant case was a matter of simple arithmetic. The regular hourly rate was a definite, specified, certain sum. Overtime was one and one-half times the regular rate. When the *Belo* plan of paying wages was in operation (Oct. 1938-Oct. 1939) this regular rate was multiplied by the statutory number of regular weekly hours and overtime hours were credited with one and one-half times the regular rate. Under the split-day plan the statutory number of regular work week hours for full time workers was also multiplied by the certain definite regular rate per hour and the overtime hours by 150% that specified regular rate, giving the identical result as under the prior valid *Belo* plan. For men who laid off a day or more during the week instead of subtracting those lost hours from the total which would result in the loss of all overtime, each day's time was calculated separately. The same certain regular rate was multiplied by

the agreed on regular number of hours worked each day and the agreed on overtime hours worked each day were multiplied by 150% of the regular rate. No complicated algebraic formula was required and the men benefited substantially by their own split-day plan of calculation, which supplanted the valid *Belo* plan.

THE TRIAL COURT'S DECISION.

The District Court gave this case careful consideration and its conclusions are well reasoned and meritorious. The *Helmerich* case, after careful analysis, is distinguished (Opinion, R. 48-50). As the trial Court cogently stated in its opinion:

> "It (the split-day plan) penalized no one but the defendant (petitioner here). *It would be incredible if the mere use of the word 'split-day' would have the magic power to render illegal a labor contract which was previously legal, even though wages paid thereunder remained the same or were increased.*" (R. 50, emphasis ours.)

(See also the fact findings of the trial Court, R. 69-79.)

IF THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT REVERSED THE KRUG-LEWIS AGREEMENT MUST UNDER THAT PRECEDENT BE HELD ALSO TO VIOLATE THE ACT.

There is now pending before this Court cases Nos. 759, 760, 781 and 782 involving the United States, John L. Lewis and the United Mine Workers of America. Those

cases involve an agreement controlling wages paid to all soft coal miners, drafted by the Secretary of the Interior, J. A. Krug, representing the United States, and John L. Lewis et al. That agreement through prior agreements which it refers to and incorporates, provides that wages of the miners be computed as follows: For the first five days of the week the men are credited each day at the "regular" or "straight time" rate for the first 7 hours and overtime or time and one-half for the 8th and 9th hours of each of these five days. If the miner chooses to work on the sixth day he receives overtime pay for any hours that he may work. In the instant case the 6-day men were paid "regular" or "straight time" for the first 7 hours of each day and overtime for the 8th hour. We have, then, a split-day plan of wage payment here involved, indistinguishable in principle from the Krug-Lewis soft coal agreement incorporating prior split-day agreements. The Krug-Lewis agreement, by incorporating the prior split-day agreements does not credit the *first* 40-hours of the week with regular or straight time pay as the Appellate Court below said must be done in order to comply with the Act. If the split-day agreement involved in the instant case constitutes a violation of the Act, then there is no escape from the conclusion that the split-day wage provisions of the Krug-Lewis soft coal agreement and the prior agreements which it incorporates, are a violation of the Fair Labor Standards Act.

It may be urged that because Krug in his capacity as "Coal Mine Administrator" represents the government, the latter is not bound by the Act. Even if true, it must be kept in mind the expectation is that the mines will

shortly be returned to the respective company owners, in which event they will inherit these split-day agreements, and all of the provisions of the Act will be applicable. If the decision of the Appellate Court below is not reversed the Krug-Lewis and prior incorporated agreements drafted and in force prior to government operation and all similar labor-employer agreements must, under that precedent, be held to violate and to have violated the Act in this respect. If the soft coal agreements should be held invalid for this reason, presumably the miners will cease working as they have done in the past when they have no contract to work under, and general public welfare will again be seriously affected. And, based on the reasoning of the Circuit Court of Appeals, hundreds of millions of dollars would be recoverable as unpaid wages and liquidated damages.

THE EMPLOYEES ARE ESTOPPED FROM CLAIMING THERE WAS ANY VIOLATION OF THE ACT.

The men, through their union, demanded that the split-day plan be adopted and were responsible for it. They have received its benefits and petitioner has sustained corresponding financial loss. Respondents are, therefore, estopped from demanding additional compensation. This principle of fundamental justice is based on the salutary premise that "no man may profit by his own wrong".

As Pomeroy says in his monumental work on "Equity Jurisprudence" (3rd ed. Vol. II, § 804):

> "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely pre-

> cluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led to change his position for the worse * * *."*

But the Appellate Court below states in its opinion in the instant case that the Fair Labor Standards Act involves "a right of a 'private-public character'," and hence this principle of equitable estoppel does not apply; and that if the men may not bind themselves by voluntary agreement, they may not by their conduct estop themselves. (R. 212.) This is to overlook the basic reason underlying equitable estoppel which does not depend in any sense on voluntary consent and agreement. Equitable estoppel operates independently of agreement and consent

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*It is a salutary practical rule that a man shall not be permitted to deny what he has once solemnly acknowledged. (*Sprigg v. Bank*, 10 Pet. 257, 265.)

The doctrine is founded, when properly applied * * * on the highest principles of morality and recommends itself to the common sense and justice of everyone. (*Van Rensselaer v. Kearney*, 11 How. 296, 326.)

"The vital principle (of equitable estoppel) is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectation on which he acted. Such a change of position is sternly forbidden." (*Dickerson v. Colgrove*, 100 U. S. 578, 580.)

"The law of estoppel is founded in reason and justice. It makes the acts and conduct of a party binding against him to assert any claim to the contrary. *He thus himself makes the law of his case, and he must abide the consequences.*" (Emphasis ours.) (*Hill v. National Bank*, 97 U. S. 450, 452-3.)

"Persons must take the consequences of the position they assume * * * To told otherwise would be contrary to the plainest principles of reason and of good faith and involve a mockery of justice." It involves "sound ethics." (*Casey v. Galli*, 94 U. S. 673, 680; *Gilbert v. United States*, 8 Wall. 358, 361.)

of the party estopped. It acts inexorably, and the will of the party estopped is not consulted; in fact, the estoppel operates contrary to his wish and will. It is true that "public interest" is involved in the Fair Labor Standards Act. But the doctrine of equitable estoppel is likewise based on "public interest".

The fact that the enforcement of a contract is against "public policy" does not prevent the operation of estoppel. (*Kinsman v. Parkhurst*, 18 How. 289, 293.)

"He entered of his own accord into the second contract and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract." *United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 303, 309; *Storm v. United States*, 94 U. S. 76, 83; *Fort Worth Co. v. Smith-Bridge Co.*, 151 U. S. 294, 302; *Magee v. United States*, 282 U. S. 432, 434.

The leading case on the subject by this Court (*Daniel v. Tearney*, 102 U. S. 415) holds, that the principle of equtable estoppel "has its foundation in wise and salutary policy. It is a means of repose. It promotes fair dealing * * *. *Like the Statute of Limitations it is a conservator, and without it society could not well go on.*" (p. 421, emphasis ours.) If this is not a principle found on "public interest", then it would be difficult to find one. This decision says, in so many words, equitable estoppel is "like the Statute of Limitations". If equitable estoppel is not controlling here, then "it follows as the night the day" the

bar of the Statute of Limitations may not be invoked in any case involving the Act, and yet the Courts without exception have applied the bar of limitations.

Not to apply in the instant case the "wise and salutary" doctrine of equitable estoppel, without which "society could not well go on", would be, to use the language of this Court, "a mockery in judicial administration and 'a violation of the plainest principles of reason and justice'." (102 U. S. 415, 422.)*

Wherefore, for the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
December 28, 1946.

ALASKA JUNEAU GOLD MINING COMPANY,
Petitioner,

By WM. E. COLBY,
Counsel for Petitioner,

GEO. W. WILSON,
Of Counsel.

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*See also to the same effect: *Shepard v. Barron*, 194 U. S. 553, 567-8; *Pierce v. Somerset Ry.*, 171 U. S. 641, 648; *U. S. Gas Co. v. R.R. Comm.*, 278 U. S. 300, 307-8; *Calhoun v. Massie*, 253 U. S. 170, 177; *Hine v. Morse*, 218 U. S. 483, 510-11.

CERTIFICATE OF COUNSEL.

I, WM. E. COLBY, counsel for the petitioner, do hereby certify that in my judgment the foregoing petition for Writ of Certiorari is well founded, and I further certify that the same is not interposed for delay.

Dated, San Francisco, California,
December 28, 1946.

WM. E. COLBY,
Counsel for Petitioner.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 836

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Respondents (Appellants below),

vs.

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Petitioner (Appellee below).

PETITIONER'S REPLY TO RESPONDENTS' BRIEF.

WM. E. COLBY,
1806 Mills Tower, San Francisco 4, California
Counsel for Petitioner.

GEO. W. WILSON,
1806 Mills Tower, San Francisco 4, California,
Of Counsel.

Subject Index

	Page
Opinions Below	2
The fact that at one time the soft coal miners had a seven hour day does not alter the fact that they are now and for years past have been regularly working nine hours	2
This court has recently granted certiorari in three cases involving similar questions and principles	3
Longshoremen as well as coal miners have been working under a split-day plan	4

Table of Authorities Cited

Cases

	Page
Addison v. Huron Stevedoring Corp. and Aaron v. Bay Ridge Operating Co. (Civ. 33-212 and 213)	4
Madison Avenue Corp. v. Asselta, et al. (Docket No. 497)	3
Walling v. General Industries Co. (Docket No. 564)	3
Walling v. Halliburton Oil, etc. Co. (Docket No. 74)	3

Statutes

Fair Labor Standards Act, Section 7	5
Fair Labor Standards Act, Section 7(a)	3

Texts

Hughes, Federal Practice, Volume 8, Section 6267	1n

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Petitioner (Appellee below).

PETITIONER'S REPLY TO RESPONDENTS' BRIEF.*

*Reply briefs by petitioners are recognized in practice. Hughes, *Federal Practice*, Vol. 8, § 6267.

OPINIONS BELOW.

We correct an oversight in the petition. The District Court's opinion, findings of fact and conclusions of law are reported in 61 F. Supp. 265. The opinion of the Circuit Court of Appeals (Ninth Circuit) has just been reported in 157 Fed. (2d) 876.

THE FACT THAT AT ONE TIME THE SOFT COAL MINERS HAD A SEVEN HOUR DAY DOES NOT ALTER THE FACT THAT THEY ARE NOW AND FOR YEARS PAST HAVE BEEN REGULARLY WORKING NINE HOURS.

Respondents urge by way of reply that because the coal miners had at one time a regular seven hour day this distinguishes their case, and though it has been customary for the coal miners in recent years to work longer hours than 7 per day that these 8th and 9th hours of each day may be lawfully characterized as "overtime" and paid for accordingly. This is to ignore the axiomatic fact that when the coal miners work more hours *regularly* every day, these regularly worked extra hours cannot be differentiated in any basic way from those hours designated as "overtime" in the instant case. That the reasoning of respondents' counsel is erroneous and that the coal industry is confronted with the identical question here presented is convincingly established by excerpts from a transcript of proceedings of a meeting of the "Coal Conference", which has come to our attention since filing the petition and which excerpts are added hereto as "Appendix A." The Wage and Hour Administrator's

attention was there called to this very "seven hour day" situation in the coal industry, and the discussion which took place at the conference is proof that the question here involved is a live one as far as the coal mining industry is concerned and one that, according to the Wage and Hour Administrator, can only be answered by the Courts. This fact furnishes cogent reason why this question should receive the attention of this Court at this time.

THIS COURT HAS RECENTLY GRANTED CERTIORARI IN THREE CASES INVOLVING SIMILAR QUESTIONS AND PRINCIPLES.

This Court's attention is respectfully called to the following cases, which have only come to our attention since the docketing of the petition and in each of which petitions for certiorari have been granted:

Walling v. Halliburton Oil, etc. Co. (Docket No. 74);

Madison Avenue Corp. v. Asselta, et al. (Docket No. 497);

Walling v. General Industries Co. (Docket No. 564).

While the facts of these pending cases differ in some respects, the underlying principles and questions presented are the same as in the instant case and involve:

(1) An interpretation of Sec. 7(a) of the Fair Labor Standards Act;

(2) Agreement by employers and employees on a somewhat similar wage formula;

(3) Adoption of a "regular" hourly rate which was constant and paid in actual practice, with "overtime" calculated and paid at 150% of the regular rate;

(4) Whether "overtime" must be paid only for hours at the end of the week "after" and "following" the first 40 hours of straight time and specifically designated as "overtime".

In the cases above noted regular time and overtime were combined and paid for in a lump sum, and overtime payment made for hours "in excess of" 40 per week rather than for hours "following" the first 40, the very question here involved.

LONGSHOREMEN AS WELL AS COAL MINERS HAVE BEEN WORKING UNDER A SPLIT-DAY PLAN.

On the day that this petition was docketed, Jan. 6, 1947, Judge Rifkind, United States District Judge of the Southern District of New York, handed down a decision in the cases of *Addison v. Huron Stevedoring Corp.* and *Aaron v. Bay Ridge Operating Co.* (Civ. 33-212 and 213) establishing the fact that longshoremen as well as the coal miners have been working under a wage system whereby the day's wages have been split into hours of regular time and overtime. The overtime hours were there distributed through the days of the week instead of being concentrated at the week's end after 40 hours of regular time had been worked. This is the situation in the instant case. Judge Rifkind held that this splitting of the day was

not a violation of the Act and that Sec. 7 of "the Statute clearly does not speak of premium payments for hours *following* the first forty, but only for hours in *excess* of forty." This is the exact reverse of the ruling of the Appellate Court below and indicates that there is a wide divergence of opinion on this point in the Federal Courts which should be finally decided here and also that this question is of far reaching public interest because it involves not only the coal miners but the longshoremen as well.

This Court has many times refused to substitute "shadow for substance" or, as Mr. Chief Justice Hughes once expressed it, has refused "to make a legal fiction dominate realities" (298 U.S. 211), which is just what the Appellate Court has done here. Certiorari should be granted.

Dated, San Francisco, California,
February 3, 1947.

Respectfully submitted,
WM. E. COLBY,
Counsel for Petitioner.

GEO. W. WILSON,
Of Counsel.

(Appendix A Follows.)

Appendix A

United States Department of Labor

Wage and Hour and Public Contracts Divisions

In the Matter of:

COAL CONFERENCE

Before

L. Metcalfe Walling, Administrator

May 17, 1946, Room 1213, U. S. Department of Labor
165 West 46th Street, New York 19, New York

PRESENT

WAGE AND HOUR STAFF:

L. Metcalfe Walling, Administrator, et al.

COAL OPERATORS:

Robert R. Bruce, Anthracite Operators, Attorney 40 Wall Street, New York, N. Y.

J. B. Morrow, President, Pittsburgh Coal Company, Operators Committee, Pittsburgh Coal Company, Pittsburgh, Pa.

G. M. Thursby, Bituminous Operators, Frick Bldg., Pittsburgh, Pa., et al.

(Excerpts from transcript of conference.)

"Mr. Bruce. Yes, I mean a case where it is obvious an employee in a suit under Section 16 (b) would have

no recovery because we pay him more than 7 (a) required. Have we violated the Act? The Act is intended to give a certain amount of money to an employee for hours in excess of 40. We will assume there is no question of minimum because there wasn't any in the case. We have paid that quantity of money. Have we violated the Act by virtue of the fact that formally and as a matter of record keeping, we didn't pay rate and a half on the four and six cent shift differential?

Administrator Walling. When you said they paid that quantity of money, you mean, are they entitled to credit for the daily overtime beyond the seventh hour to offset the failure to pay the shift differential? Is that it?

Mr. Bruce. That is another way of putting it, yes, sir.

Administrator Walling. Well, I am not prepared to give you today a final legal statement on that. I will outline to you what I think the considerations are. *The question, of course, is whether the fact that you have been consistently working a longer work day than the seven-hour day which your contract provides for at straight time for a period of some years now, affects the overtime nature of that pay which you are giving for the eighth and successive hours and whether it thereby increases the regular rate of pay.* Now, as you know, the Supreme Court has said in a case which is not by any means identical with yours but is somewhat similar, in dealing with the so-called Poxon

plan that you cannot make an arbitrary division between regular time and overtime. Now, the Poxon plan was different, of course, from your arrangement because it is perfectly obvious there that the assignment of what was straight time and of what was overtime was purely arbitrary and had no relationship to a normal work week schedule, whereas your plan was a war time modification, as I understand it, of what had been a well-established work day in the industry. The question is whether that variation is significant enough to take it out from the doctrine of the Poxon plan or not, and you have, as I understand it, along with the union, assumed that this overtime credit could be set off against any weekly overtime obligation, and you have proceeded on that basis. We certainly aren't at this time prepared to say that that cannot be done. * * *

Administrator Walling. I will make this statement to you right here and now. If at any time we do have occasion to question it, you will be notified. We are not questioning it today, and *whether there will be in the future a court decision, which will require us to question it, I am not going to predict;* but at the present we are not taking the position that you may not credit the eighth and successive hours against the overtime. If we do take that position, you will be duly notified and we will not creep up from behind and catch you unaware.

Mr. Bruce. If I understand your remarks, Mr. Walling, though, you are not approving our present practice?

Administrator Walling. Well, I would like to put it this way: I am not disapproving. *Only a court can give you final and binding legal approval.* * * *

Administrator Walling. Well, that is something which one of you brought up and I answered the question as directly as I can, because I think it is only fair to you to point out all the considerations which will go to influence the court in its ultimate decision, if there is ever a court test on the question. I think I indicated that I considered that yours is certainly not identical with the Poxon plan, but that I think the test of whether you are entitled to a setoff or not is whether this is bona fide overtime or whether it is a regular rate of pay in disguise.

Mr. Bruce. What you are saying in effect is that—which I think the coal operators should take notice of—that *there is a possibility that the courts might say that anything over any work week less than 40 hours for the purposes of the Wage and Hour Law is an arbitrary work week.* That is what you are suggesting might be so, but the Wage and Hour Division is not taking that position as at the present day, *and no matter how long established that work week has been less than 40 hours, it would not be regarded as a valid breaking point between straight time and overtime for the purposes of the Wage and Hour Law.*

Administrator Walling. * * * if at any time, a decision has to be made *because of court decisions which subsequently come down* or because we feel on closer analysis of those which have already come down

that we have to do it, we shall advise you before we do it. I think that is all that I can say to you today, since *I am not clothed with the power to make binding legal commitments, as you well know, of the interpretation of this law.* I am only a guesser, like yourselves. * * *

Mr. Morrow. I would like to ask a question, Mr. Walling. It is rather hypothetical, perhaps, but supposing some agency of the government introduced a contract, as has been done in the past, and you were forced—perhaps it is not quite the right word, but almost—to sign that contract. Are we liable under Wage and Hour for a contract made by some other agency of the Government? * * *

Administrator Walling. I should hope that any decision which might be reached would be within the frame work of the Fair Labor Standards Act. But *in any event the courts will give you the answer on that.*

Mr. Thursby. Mr. Walling, before we leave this point of shift differentials in particular, there is the calculation of court decisions in the matters we have considered, and the court holds and your fears might be realized, that *would mean that we would have to pay overtime beyond 40 hours on each rate that is paid,* is that right, *regardless of any accretions of overtime* in excess of time and a half beyond 40 hours that is paid on some other rate?

Administrator Walling. First, let me amend your statement, if I may, by deleting the words 'my fears,'

because that doesn't represent my point of view. As to the question of what your obligation would be, *your obligation under the law simply is to pay a 50 per cent premium on the overtime hours beyond forty.* Now, if you have a credit that you can offset against that, then to that extent you have reduced your obligation. Now, *if you aren't allowed any credit, then, of course, you haven't taken care of the obligation.*

Mr. Thursby. That is, the credit would only come through some other rate that is paid?

Administrator Walling. Some other overtime rate, that is right, because *you cannot credit against overtime pay that which is not paid for overtime purposes.* * * *"

(Emphasis in all the foregoing excerpts supplied.)

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CHARLES ELMORE CROPLEY
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 836

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Respondents (Appellants below),

vs.

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Petitioner (Appellee below).

On Petition for a Writ of of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS (APPELLANTS BELOW) IN OPPOSITION.

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument	6
Conclusion	8

Table of Authorities Cited

Cases

	Pages
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697	7
De Pasquale v. Williams-Bauer Corporation, et al. (CCA 2), 151 F. (2d) 178	7
Fleming v. Alaska Juneau Gold Mining Company, No. 21843-S	5
Overnight Transportation Co. v. Missel, 316 U.S. 572	7
Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590	7
Walling v. Alaska Pacific Consolidated Mining Co., 152 F. (2d) 812	7
Walling v. Belo Corporation, 316 U.S. 624	4
Walling v. Helmerich & Payne, 323 U.S. 37	6,7

Statutes

Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. § 207):	
Section 7	7
Section 7(a)	3
Judicial Code, Section 240(a), as amended by Act of February 13, 1925 (28 U.S.C. § 347)	2

Miscellaneous

Collective Bargaining Contracts and Negotiations, Bureau of National Affairs, 25:1	8

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 836

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Respondents (Appellants below),

vs.

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Petitioner (Appellee below).

On Petition for a Writ of of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS (APPELLANTS BELOW) IN OPPOSITION.

OPINIONS BELOW.

The opinion (R. 44-51) and findings of fact and conclusions of law (R. 69-79) of the District Court are reported in 61 F. Supp. 265. The opinion of the Circuit Court of Appeals (R. 204-213) is reported in 11 Labor Cases, parag. 63,424.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered November 5, 1946 (R. 214) and rehearing was denied December 5, 1946 (R. 215). Jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. § 347).

QUESTIONS PRESENTED.

1. Whether the Circuit Court of Appeals erred in holding that the so-called split-day method of wage payment, as applied by the petitioner, violated the Fair Labor Standards Act.

2. Whether the Circuit Court of Appeals erred in holding that the employees involved are not estopped from recovering overtime pay and liquidated damages by reason of the fact that the split-day plan was embodied in a collective bargaining agreement between petitioner and the representative of the employees.

3. Whether the Circuit Court of Appeals erred in reversing the decision of the trial Court.

STATUTE INVOLVED.

Section 7(a) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. § 207) provides under the heading "Maximum Hours":

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date,
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed * * *"

STATEMENT.

The petitioner, Alaska Juneau Gold Mining Company, has for many years been engaged at Juneau, Alaska, in the mining, milling, smelting, sale and distribution of gold, silver, and lead. The respondents were employed by petitioner in various occupations connected with the mining and milling of its products.

Prior to the effective date of the Act, petitioner employed respondents on a daily (shift) basis. The

regular working day (shift) was eight hours. (R. 174.) However, respondents were paid proportionately for hours worked in excess of or fewer than eight, so that the daily wage was actually based on an hourly rate. Some of the respondents worked a 56-hour and some a 48-hour week. The respondents received the same hourly rate for every hour worked during a week regardless of the number of hours worked. There was no "overtime" rate paid for hours worked in excess of any given number per week. (R. 180.)

When the Act went into effect on October 24, 1938, petitioner continued to work the respondents 48 and 56 hours per week, i.e., six and seven 8-hour shifts. However, it reduced the respondents' basic rates of pay, so that when 44 hours (the statutory maximum) of straight-time pay was added to the number of hours per week paid for at overtime rates, the weekly compensation remained substantially what it was prior to the Act. (R. 143-144; 158.) In short, petitioner instituted a "Belo" type reduction. (*Walling v. Belo Corporation,* 316 U.S. 624.)

In October, 1939, petitioner, pursuant to an agreement with the Union which had shortly before this date been certified as the collective bargaining representative of petitioner's employees (R. 148), ceased to pay weekly overtime for work in excess of 44 hours and adopted a "split day" or "daily overtime" plan. (R. 150-151; Deft's Exh. F in evidence.) Under this plan the first seven hours of the shift were designated as "straight time" hours and the eighth hour was designated as an "overtime" hour. "Straight time"

rates of pay were established in an amount which, when added to the amount received for "overtime", would return to the worker, for an eight hour day, the same daily wage he had received prior to the effective date of the Act. (R. 158.) For example, worker who prior to the Act had earned $4.75 for an 8 hour day, were now paid a "straight time" hourly rate of 55.8¢. This rate was paid for the first seven hours, and time and one-half, or 84¢, was paid for the eighth hour. The total pay received for 8 hours of work was $4.75, the same as prior to the Act. In May, 1940, in anticipation of the reduction of the statutory workweek from 42 to 40 hours, the workday was redivided into 6.6 hours of "straight time" and 1.4 hours of "overtime." (R. 151.) The "straight time" rate of pay was again reduced so that, when added to the "overtime", the pay for eight hours work remained practically the same as before. Throughout these various adjustments of rates the regular shift remained at eight hours. (R. 132, 174.)

In December, 1940 the Regional Director of the Wage and Hour Division notified petitioner that the split-day plan of computing wages was in violation of the Act (R. 163-166) and on May 1, 1941, petitioner discontinued the plan. A stipulated judgment was entered in the United States District Court for the Northern District of California, Southern Division (*Fleming v. Alaska Juneau Gold Mining Company*, No. 21843-S) pursuant to which the employees were reimbursed for unpaid overtime compensation from the date of notification by the Wage and Hour Division to May 1, 1941.

The present action was instituted on April 23, 1943, by eleven named plaintiffs (by amendment eight additional plaintiffs were later joined) to recover unpaid overtime compensation and liquidated damages for the period from April 23, 1940, to May 1, 1941. Respondents have conceded that petitioner is entitled to a credit for the amount of overtime compensation paid pursuant to the consent decree mentioned above. The District Court held for petitioner. The Circuit Court of Appeals reversed and held that respondents were entitled to recover.

ARGUMENT.

1. That the "split-day" plan of wage payment and overtime calculation adopted by the Company was in violation of the Act is conclusively established by *Walling v. Helmerich & Payne,* 323 U.S. 37, which is controlling on all essential points. In that case, as in the instant case, the employer sought to satisfy the overtime requirements of the Fair Labor Standards Act by arbitrarily dividing the normal workday into segments, one of which was termed the "straight time" period, the other the "overtime" period. In both cases, the employer sought to credit the so-called overtime against the statutory obligation to pay time and one-half for all hours in excess of 40 (previously 42 and 44) hours per week. In neither case was the "overtime" true overtime, i.e., hours worked outside the normal or regular working hours. In both cases the employees were actually employed at two straight-time rates of pay, one applying to certain hours of the

normal work-day, the other applying to certain other hours of the work-day. Under these circumstances, as this Court pointed out in *Walling v. Helmerich & Payne, supra,* the "regular rate" on which overtime is computed under Section 7 of the Act is the average hourly rate for the week (or shift), ascertained by dividing the weekly earnings at both rates by the total number of hours worked. Cf., *Walling v. Alaska Pacific Consolidated Mining Co.,* 152 F. (2d) 812. By treating the lesser of the two straight-time rates as the "regular rate", and computing "overtime" thereon, petitioner's employees received somewhat less per week than they were entitled to receive under a correct computation of overtime.

2. It is well settled that agreement by employees or their representatives to a plan of wage payment which does not conform to the Act, creates no estoppel against the employees.

Overnight Transportation Co. v. Missel, 316 U.S. 572;

Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590;

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697;

De Pasquale v. Williams-Bauer Corporation, et al. (CCA 2), 151 F. (2d) 178.

3. The issues in this case are neither novel nor of general significance. The petitioner, as stated above, abolished the split-day plan in the year 1941, as did other metal mines following the Administrator's ruling as to its illegality. (R. 163-166.) The effort to link this case with the soft coal miners cases (Peti-

tion for Cert., pp. 19-21), falls short. We are not aware that any of the United Mine Workers contracts now before this Court present the question of the legality of any overtime wage payment plan. Furthermore, the contract between the Bituminous Coal Operators and the United Mine Workers of America, as confirmed by the agreement with the United States Coal Mines Administration, specifically provides that "Seven hours of labor shall constitute a day's work". (*Collective Bargaining Contracts and Negotiations*, Bureau of National Affairs, 25 : 1), thereby showing conclusively that the seven hour day in the coal mines is not a mere device to get around the overtime provisions of the Act, and that time worked in excess of seven hours is true overtime work. Contrast the situation in the instant case where throughout all the various manipulations of "straight" and "overtime" rates, the regular working day remained eight hours, and was so designated in the collective bargaining agreements of the parties. (R. 132; Def's. Exhs. E, F, G, and H, in evidence.)

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated, Oakland, California,
January 29, 1947.

Respectfully submitted,
BERTRAM EDISES,
Attorney for Respondents.

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 836

ALASKA JUNEAU GOLD MINING COMPANY, A CORPORATION, PETITIONER

v.

E. E. ROBERTSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

This case presents the question whether the overtime requirements of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, are satisfied by dividing a daily wage paid for 8 hours of work into "straight time" for 6.6 or 5.7 hours and "overtime" for 1.4 or 2.3 hours in such a way that the total daily compensation equals the agreed daily wage. The question is no different from that settled in *Walling* v. *Helmerich & Payne,* 323 U. S. 37, and that presented in *Walling* v. *Alaska Pacific Consolidated*

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Mining Co., 152 F. 2d 812 (C. C. A. 9), certiorari denied, 327 U. S. 803.

The three cases now pending before this Court which involve the interpretation of Section 7 of the Act (*Walling* v. *Halliburton Oil Well Cementing Co.*, No. 74; *149 Madison Ave. Corp.* v. *Asselta*, No. 497; *Walling* v. *The General Industries Co.*, No 564), are concerned with the correct means of determining the regular rate when the employee is paid a basic weekly or monthly salary and do not involve the issue raised by petitioner here. The validity of the overtime provisions of the "Krug-Lewis contract" referred to on page 10 of the petition is not raised in the cases there cited, and in any event that agreement, providing for daily overtime after 7 hours (the normal prewar work-day in the mines), may be distinguished from a transparently artificial device to pay "overtime" after 6.6 or 5.7 hours.

Inasmuch as the petition raises only questions already settled by decisions of this Court, and not involved in cases now pending before it, we respectfully submit that the petition should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.

WILLIAM S. TYSON,
Solicitor, U. S. Department of Labor.

JANUARY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 836

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Respondents (Appellants below),

vs.

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Petitioner (Appellee below).

PETITION FOR REHEARING.

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PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
New act of Congress now involved	2
The pertinent provisions of the act	2
Facts	4
Argument	7
The retroactive features of this remedial legislation are constitutional and valid	7
A mere repeal even of a statute voids rights sought to be exercised under the statute prior to repeal	8
In its recent statute Congress has specifically expressed disapproval of certain claims of employees arising under the Fair Labor Standards Act	9
Because of the public nature of the Fair Labor Standards Act, its provisions are not binding upon a subsequent Congress	9
Public interest involved	11

Table of Authorities Cited

	Pages
Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548	8, 10
Boyd v. Alabama, 94 U. S. 645,	10
Brooklyn Bank v. O'Neil, 324 U. S. 697	10
Ewell v. Daggs, 108 U. S. 143 (1883)	8, 10
Gibbes v. Zimmerman, 290 U. S. 326 (1933)	8
Hamilton v. Kentucky Distilleries Co., 251 U. S. 146	10
Louisville, etc. R. R. Co. v. Mottley, 219 U. S. 467	9
Maryland v. Baltimore & Ohio R. Co., 3 How. 534	8
Morley v. Lake Shore Railroad Company, 146 U. S. 162 (1892)	8
Norman v. B. & O. R. Co., 294 U. S. 240	9
Norris v. Crocker, 13 How. 429	8
Ogden v. Glackledge, 2 Cranch 272 (1804)	8
Oshkosh Water Works Company v. Oshkosh, 187 U. S. 437 (1903)	8
Pearsall v. Great Northern Railway, 161 U. S. 646 (1896)	8
South Carolina v. Gaillard, 101 U. S. 433 (1879)	8
Stone v. Mississippi, 101 U. S. 814	10
Sutter Butte Canal Co. v. Railroad Com., 279 U. S. 125	10
Union Dry Goods v. Georgia P. S. Corp., 248 U. S. 372 (1919)	8, 10
U. S. v. Darby, 312 U. S. 100	9
Western Union Tel. Co. v. L. & N. Railroad Co., 258 U. S. 13	8

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Respondents (Appellants below),

vs.

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),
Petitioner (Appellee below).

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Alaska Juneau Gold Mining Company, respectfully prays for a rehearing of the order of this

Court dated May 12, 1947, denying its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

NEW ACT OF CONGRESS NOW INVOLVED.

This is an action under the Fair Labor Standards Act for time and a half overtime and liquidated damages. Congress has just enacted a law signed by the President on May 13, 1947, commonly referred to as the "Portal to Portal" statute.

THE PERTINENT PROVISIONS OF THE ACT.

Congress in Part I of the Act makes certain findings and declares its policy in enacting the statute. These purposes are to abrogate "unexpected liabilities" arising under judicial interpretation of the Fair Labor Standards Act which, if allowed to stand, would constitute "a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce", and that "it is in the national public interest and for the general welfare," etc. "that this Act be enacted." The preamble concludes as follows:

> "It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts."

Part II of the Act makes its provisions expressly applicable to "existing claims."

The specific provision of the Act upon which this Petition for Rehearing is primarily based is Section 9 of Part IV which is as follows:

"Sec. 9. *Reliance on Past Administrative Rulings, Etc.*—In any action or proceeding *commenced prior to* or on or after *the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay* minimum wages or *overtime compensation under the Fair Labor Standards Act of 1938, as amended,* the Walsh-Healey Act, or the Bacon-Davis Act, *if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation,* of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. *Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.* (Italics supplied.)

(Note: The "Statement of the Managers on the Part of the House" accompanying the Conference Report says "that the administrative regulation, order, etc. does not have to be in writing.")

The Act contains other retroactive features which are applicable to the instant case, such as Part II, Sec. 3, relating to compromise of existing claims and Part IV, Sec. 11, relating to "Liquidated Damages", but we will not burden this Court at this time with a discussion of these features for, in our opinion, Sec. 9 is ground for a dismissal of the action and an affirmance of the trial Court's judgment to that effect.

FACTS.

The answer of this petitioner as defendant in the trial Court alleged as follows:

"III. *That calculating and paying to employees their basic wage and overtime wage on a daily basis was specifically and publicly approved* as in compliance with the provisions of the Fair Labor Standards Act *by Elmer F. Andrews, the then Administrator of the Federal Wage-Hour legislation and the Fair Labor Standards Act* (72) at a meeting held May 10, 1939, in Washington, D. C., of Congressmen from the mining states, which meeting was convened for the very purpose, among others, of discussing these wage-hour questions and which meeting was also attended by representatives of the mining industry, this defendant being there represented by H. L. Faulkner, one of its attorneys from Juneau, Alaska. That *said approval of the method of daily calculation of basis and overtime wages received wide circulation in the mining world* and a bulletin setting forth said Andrews' approval of such method was published on May 13, 1939, and widely distributed by the American Mining Congress, one of the leading and recognized mining organizations in the United States. (R. 34-5.)

IV. That on July 12, 1940, Baird Snyder, then *Chief Deputy of the Federal Wage-Hour Division*, wrote the Colorado Mining Association at Denver, Colorado, that *daily circulation (calculation) of overtime*, totaled at the end of the week, similar to the method followed by this defendant, *was permissible under the provisions of the Act.* (R. 35.)

V. That as a direct result and consequence of said interpretation of the Act by representatives of the Wage-Hour Division, as aforesaid, *such information* having *reached the employees of this defendant, said employees* considered it a distinct advantage to them to have their overtime calculated on a daily basis and in October, 1939, through their Union, they *insisted that this defendant change its wage schedule so that*

overtime would be computed daily instead of weekly, as was being done at that time. *Acting as a result of the insistence of said Union and relying on the aforesaid interpretation of the Act by the representatives of said Wage-Hour Division,* the then existing agreement between the Union and this defendant company was modified and *the company (73) began to pay its employees overtime on a daily calculated basis which, in the absence of said favorable opinion by said Administrator, it would not otherwise have done.*" (R. 35-36.)

The trial Court in its opinion held:

"Mr. Faulkner, the attorney for the company, conferred in Washington with Mr. Andrews, the then Administrator of the Wage and Hour Division, with (92) regard to the legality of such a plan. The Administrator stated publicly that such a plan was legal and authorized." (R. 45.)

" " " defendant's dealings with its employees were lawful and in good faith " " "" (R. 50.)

The Findings of Fact state:

"VIII. Mr. Faulkner, representing defendant, was in May, 1939, in Washington, D. C., and at a meeting of Congressmen and mine representatives heard Andrews, then Administrator of the Wage and Hour Division having charge of the administration of the Fair Labor Standards Act, state publicly that the split-day plan of paying wages was valid and in compliance with the Act, and Faulkner so advised this defendant." (R. 73.)

"" " " *Throughout, in dealing with its employes the defendant company has exercised good faith* and has made no attempt to coerce or force the men to enter into any agreements to their disadvantage." (R. 76-77.)

The following testimony of Mr. H. L. Faulkner, for defendant, appears in the Transcript of Record:

"* * * I went to Washington * * *. While there I attended a conference held between the administrator, Mr. Andrews, and nineteen congressmen and two or three other men at which an interpretation——

Q. Were there any mining men there?

A. Yes, four or five, besides the congressmen from the mining states—nine of them from the western mining states—and about five mining men, including some men from Nevada, Arizona——

Q. * * * *What did the administrator state at that meeting* in answer to a question by some person there, *as to whether the split day plan was authorized by the act, or not?*

A. *The administrator said that such a plan was legal and authorized.* * * *

A. The American Mining Congress put out a bulletin which was very widely circulated all over the United (180) States and Alaska, containing the results of this interview." (R. 116-117.)

This bulletin was introduced as Defendant's Exhibit A (R. 120) and which announced this interpretation of the Act by the then Wage and Hour Administrator.

A copy of the Deputy Administrator's letter to the Mining Association was also introduced as Exhibit J (R. 189) and the pertinent portion states:

"* * * our regulations * * * permit three methods of payment for overtime * * *

3. Pay it by any unit of time during the week *daily, that is, by the shift, by the day, or whatever daily unit of time you elect, and to add up all the overtime so paid, which you can then apply at the end of the week to the total overtime* due for the week. See paragraph 19 of Interpretative Bulletin No. 4." (R. 190-191.)

ARGUMENT.

Petitioner assigns the following reason for granting this petition for rehearing:

The testimony above quoted given at the trial establishes petitioner's pleaded defense that the then Administrator of the Wage and Hour Division had interpreted the Act to permit of daily credit of overtime and had specifically approved of such method of payment and that this petitioner had, in good faith, relied on this approval and interpretation and, in yielding to the demands and insistence of its employees that overtime be paid daily, acted in conformity with and in reliance on this administrative interpretation and ruling. The portion of the recent Act above quoted specifically relieves petitioner of any liability for any additional overtime wages and liquidated damages as claimed in this action.

THE RETROACTIVE FEATURES OF THIS REMEDIAL LEGISLATION ARE CONSTITUTIONAL AND VALID.

The rights of employees granted under Section 7 of the Fair Labor Standards Act are in the nature of public rights granted to effectuate a declared legislative policy and, therefore, may be taken away retroactively to effectuate a similar curative legislative policy.

This question of the constitutionality of the recent Act in so far as one of its primary objects is "to relieve employers from certain liabilities and punishments (both past and future) under the Fair Labor Standards Act" was carefully considered by Congress prior to the passage of the bill. There is nothing inherently unconstitutional in retroactive civil legislation. A vested property right may lawfully be abolished retroactively when Congress is exercising a power specifically conferred on it by the

Constitution. Rights of employees arising under Section 7 of the Fair Labor Standards Act are in the nature of public rights granted to effectuate a declared legislative policy and, therefore, *a fortiori*, can be taken away retroactively to effectuate a declared legislative policy.

A MERE REPEAL EVEN OF A STATUTE VOIDS RIGHTS SOUGHT TO BE EXERCISED UNDER THE STATUTE PRIOR TO REPEAL.

On this point, see:

Western Union Tel. Co. v. L. & N. Railroad Co., 258 U. S. 13;

Norris v. Crocker, 13 How. 429;

Maryland v. Baltimore & Ohio R. Co., 3 How. 534;

Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548;

South Carolina v. Gaillard, 101 U. S. 433 (1879);

Pearsall v. Great Northern Railway, 161 U. S. 646 (1896);

Gibbes v. Zimmerman, 290 U. S. 326 (1933);

Ogden v. Glackledge, 2 Cranch 272 (1804);

Ewell v. Daggs, 108 U. S. 143 (1883);

Morley v. Lake Shore Railroad Company, 146 U. S. 162 (1892);

Oshkosh Water Works Company v. Oshkosh, 187 U. S. 437 (1903);

Union Dry Goods v. Georgia P. S. Corp., 248 U. S. 372 (1919).

IN ITS RECENT STATUTE CONGRESS HAS SPECIFICALLY EXPRESSED DISAPPROVAL OF CERTAIN CLAIMS OF EMPLOYEES ARISING UNDER THE FAIR LABOR STANDARDS ACT.

Congress has plenary power to abrogate a private property right in furtherance of a legislative policy based on public interest.

The leading case is *Norman v. B. & O. R. Co.*, 294 U. S. 240, where Mr. Chief Justice Hughes held that gold clauses in private contracts were subject to the superior constitutional authority of Congress. See also *Louisville, etc. R. R. Co. v. Mottley*, 219 U. S. 467 and cases cited in both cases. In the foregoing cases the taking was retroactive and the parties were prevented from collecting what would otherwise have been due. Congress having the unquestioned power under the commerce clause to compel employers to establish work hours and to regulate wages for the benefit of employees in interstate commerce must necessarily have the concurrent and corollary power to take away those rights when Congress has found them to have been exercised in a manner burdensome to that commerce. In its recent Act there can be no doubt as to the intent of Congress on this point because that intent has been specifically expressed.

BECAUSE OF THE PUBLIC NATURE OF THE FAIR LABOR STANDARDS ACT, ITS PROVISIONS ARE NOT BINDING UPON A SUBSEQUENT CONGRESS.

The Fair Labor Standards Act has been upheld by this Court as an exercise "of plenary power conferred on Congress by the commerce clause", *U. S. v. Darby*, 312 U. S. 100.

It is similar to the police powers exercised by the states.

Hamilton v. Kentucky Distilleries Co., 251 U. S. 146;

Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 580.

Cases decided by this Court and holding that under the exercise of the police power the States may by legislation abrogate previously existing private rights are legion. The following are a few of the leading cases:

Boyd v. Alabama, 94 U. S. 645, 650;

Stone v. Mississippi, 101 U. S. 814, 817, 819;

Ewell v. Daggs, 108 U. S. 143, 151.

These last cited cases State statutes repealed rights arising under earlier State statutes.

See also,

Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372, 375-6;

Sutter Butte Canal Co. v. Railroad Com., 279 U. S. 125, 138.

This Court has held that the right conferred by the Fair Labor Standards Act to collect overtime pay and liquidated damages is a civil penalty and "a statutory right conferred on a private party, but affecting the public interest" which may not be waived privately where such waiver "contravenes public policy."

Brooklyn Bank v. O'Neil, 324 U. S. 697, 704, 709, 711.

In the instant case the Appellate Court below has held in so many words that claims under the Act "are statutory rights which affect the public interest." (R. 211.)

It is axiomatic, and a principle overwhelmingly established by the many cases decided by this Court, a few of which only are above cited, that Congress has the equal power of abrogating such public statutory right, such abrogation to operate retroactively as well as prospec-

tively, where it has determined in no unmistakable terms by subsequent congressional enactment that the collection of such overtime pay and liquidated damages contravenes public interest. These rights are purely statutory and must fall if the statute on which they are based is specifically and intentionally modified to effectuate a legislative policy there clearly and unequivocally expressed. This new statute says in so many words that, when an employer has, in entering into a wage-hour agreement with its employees, relied in good faith on an interpretation by the administrative officer of the government, publicly expressed, that such method of wage payment is lawful, there may be no recovery by the employee. This is the very situation here presented.

PUBLIC INTEREST INVOLVED.

The instant case is probably the first, if not the very first, to come before this Court involving this important public question. Cases of similar import are pending all over the United States. President Truman, in signing the recent Act, in his accompanying message to Congress expressly approved of the main purpose of the Act but added that the effects "can be accurately measured only after interpretation by the Courts."

We here seek such interpretation and respectfully pray that this petition for a writ of certiorari be granted.

Dated, San Francisco, California,
May 24, 1947.

ALASKA JUNEAU GOLD MINING COMPANY,
Petitioner,

By WM. E. COLBY,
Counsel for Petitioner.

GEO. W. WILSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, WM. E. COLBY, counsel for petitioner, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and is presented in good faith and not for delay.

Dated, San Francisco, California,
May 24, 1947.

WM. E. COLBY,
Counsel for Petitioner.

No. 836. ALASKA JUNEAU GOLD MINING CO. *v.* ROBERTSON ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. June 16, 1947. *Per Curiam:* The petition for rehearing is granted. The order entered May 12, 1947, denying certiorari, 331 U. S. 823, is vacated and the petition for writ of certiorari is granted limited to the question presented by the petition for rehearing as to the effect of the Portal-to-Portal Act of 1947, approved May 14, 1947, 61 Stat. 84. The judgment of reversal of the Circuit Court of Appeals is modified so as to provide that on remand to the District Court that Court shall have authority to consider any matters presented to it under the Portal-to-Portal Act of 1947. *Wm. E. Colby* for petitioner. Reported below: 157 F. 2d 876.